IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-903

ALDENS, INC.,

Petitioner,

v.

ISRAEL PACKEL, Attorney General for the Commonwealth of Pennsylvania, Individually and in His Official Capacity,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX TO BRIEF.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

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Aldens, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on August 27, 1975.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (21b-48b),[1] is not yet officially reported; the opinion of the United States District Court for the Middle District of Pennsylvania (1b-20b), is reported at 379 F. Supp. 521 (1974).

1. References herein to "b" pages are to pages in the appendix to this petition. References to "a" pages are to pages in the printed appendix in the court of appeals.

JURISDICTION.

The judgment of the court of appeals was entered on August 27, 1975. Aldens filed a timely petition for rehearing which was denied on September 26, 1975 (51b-52b).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

This case is unique in that it represents the farthest advance of state power to regulate interstate commerce ever to reach this Court; in the words of the district court, "[t]here appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here." Nevertheless, the court of appeals has sustained Pennsylvania's power to regulate Aldens' purely interstate mail order business in its sales to Pennsylvania residents despite the fact that Aldens "has no tangible property in Pennsylvania . . . employs no agents, salesmen, canvassers or solicitors in Pennsylvania . . . has no Pennsylvania telephone listing and except for its mail order catalogues and flyers . . . does not advertise by use of any Pennsylvania media . . . [and] accepts and rejects all orders for merchandise in Chicago." The case presents the following questions:

1. Does not the Due Process Clause, as interpreted by this Court in **National Bellas Hess v. Department of Revenue**, 386 U. S. 753 (1967), preclude a state's attempt to regulate out-of-state contracts between its residents and a foreign seller, where the foreign seller's only contacts with the regulating state are by means of the United States mail and by common carrier, even though the state's interest might be sufficient to justify its judicial jurisdiction?

2. Does not the Commerce Clause of the United States Constitution, as most recently construed by this Court in **National Bellas Hess** and **Allenberg Cotton Co. v. Pittman,** 419 U. S. 20 (1974), prohibit of its own force, state regulation of exclusively interstate credit transactions where the company sought to be regulated conducts no local activities whatever in the regulating state and where Congress, while declining to preempt otherwise valid state laws in the area of credit charges, clearly has not acted to remove the per se bar of the Commerce Clause as to state regulation which places a "direct burden" on interstate commerce?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article I, Section 8, Clause 3 of the Constitution of the United States provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

The Fourteenth Amendment of the Constitution of the United States provides at Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal Truth-in-Lending Act, Pub. L. No. 90-321, Title I, provides at Section 111(b), 15 U. S. C. § 1610(b) (1968):

> "(b) This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply."

The Pennsylvania Goods and Services Installment Sales Act, Act of October 28, 1966, P. L. 55, provides at Section 103, 69 P. S. § 1103:

> "For the purposes of this act a retail installment contract, contract, retail installment account, installment account, or revolving account is made in Pennsylvania and, therefore, subject to the provisions of this act if either the seller offers or agrees in Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania buyer accepts or makes the offer in Pennsylvania to buy, regardless of the situs of the contract as specified therein.
>
> "Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania.

> "Any solicitation or communication to buy, verbal or written, originating within the Commonwealth of Pennsylvania from a resident buyer of Pennsylvania, but forwarded to and received by a retail seller outside the Commonwealth of Pennsylvania shall be construed as an acceptance or offer to buy in Pennsylvania." 1966, Special Sess. No. 1, Oct. 28, P. L. 55, art. I, § 103.

STATEMENT.

This petition raises the question whether, consistent with the Commerce and Due Process Clauses of the United States Constitution, the Commonwealth of Pennsylvania (or any other state)[2] can regulate the terms and conditions of mail order sales consummated in Chicago by a firm which has no local activities of any kind in Pennsylvania, merely because the purchaser is a Pennsylvania resident. More specifically, this case presents three issues worthy of consideration by this Court.

First, the court of appeals has refused to follow this Court's decisions in **Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.**, 292 U. S. 143 (1934), **New York Life Insurance Co. v. Dodge**, 246 U. S. 357 (1918), and

2. As is discussed more fully at p. 31, *infra*, class actions have been brought against Aldens not only in Pennsylvania but in Connecticut and Washington. In addition, the Attorneys General of Michigan and Iowa have brought actions against Aldens, and the Attorneys General of California, Missouri and West Virginia have threatened similar actions. In Iowa, Oklahoma and Wisconsin, Aldens has felt compelled to bring declaratory judgment suits, similar to the one filed in Pennsylvania, to prevent enforcement of local acts regulating open end credit accounts. Depending upon the interpretation given to the various statutes discussed in footnote 15 of the court of appeals' opinion, 37b-38b, additional actions are likely and further, the decision of the court of appeals is an open invitation to state legislatures to modify their acts to make them applicable to purely interstate transactions in yet additional states.

Allgeyer v. Louisiana, 165 U. S. 578 (1897). It held instead that purely procedural service of process cases such as **McGee v. International Life Insurance Co.,** 355 U. S. 220 (1957), and **Travelers Health Association v. Virginia,** 339 U. S. 643 (1950), have limited by implication the earlier decisions of this Court which held that the Due Process Clause denied to the states the substantive right to apply their legislation extraterritorially to out-of-state contracts. Moreover, the court of appeals reached this conclusion in the face of this Court's categorical later holding in **National Bellas Hess v. Department of Revenue,** 386 U. S. 753 (1967), that in situations like the present case the Due Process Clause continues to forbid the states from applying their substantive law to transactions which take place outside those states.

Second, the court of appeals refused to follow the decisions of this Court in **National Bellas Hess** and **Allenberg Cotton Co. v. Pittman,** 419 U. S. 20 (1974), which clearly hold that the Commerce Clause prohibits the states from regulating purely interstate transactions when the interstate seller conducts no local activities in the regulating states. For, rather than recognize **National Bellas Hess** and **Allenberg** as examples of a principle of law consistently followed by this Court, the court of appeals sought to confine them to their specific facts and to disregard their rationale and the implications of their holdings.

Finally, in a case of first impression, the court of appeals interpreted § 111(b) of the Federal Truth in Lending Act as an indication of a Congressional intent to abdicate to the states the control of finance or service charges on purely interstate transactions rather than as a provision to preserve those regulations of finance or service charges which were otherwise valid under the Commerce Clause. This interpretation flies directly in the face of the plain language of the Act.

The Facts of the Case.

Aldens is an Illinois Corporation with its only physical location in Chicago, Illinois. Since its establishment in 1902, it has conducted its business as a general retail merchandise mail order business, soliciting customers in all 50 states exclusively by means of catalogs and flyers mailed from Chicago.[3]

The course of Aldens' business with Pennsylvania residents and the extent of its contacts with the Commonwealth of Pennsylvania were summarized by the court of appeals as follows (23b-24b):

> "It [Aldens] has no tangible property in Pennsylvania. It employs no agents, salesmen, canvassers or solicitors in Pennsylvania. It has no Pennsylvania telephone listing and except for its mail order catalogs and flyers it does not advertise by use of any Pennsylvania media. It does not use any Pennsylvania credit verification sources to check on the credit of its Pennsylvania customers, although a Chicago credit reporting agency to which it resorts does inquire of credit bureaus in Pennsylvania for such information. All merchandise orders are filled from outside Pennsylvania and shipped F. O. B. from a point of origin in another state. The customers pay the shipping, handling and transportation costs. Aldens is neither required to collect nor to remit Pennsylvania use taxes nor to qualify nor to register to do business in Pennsylvania. It accepts or rejects all orders for merchan-

3. The factual record in this case consists of a stipulation between the parties approved by the district court (31a-38a). Respondent contested the relevancy of only four of twenty-four paragraphs of the stipulation (42a-43a); the court ruled three of the four relevant. Those portions of the stipulation accepted by the district court as relevant were quoted in full in its opinion (379 F. Supp. at 525-527; 4b-9b).

dise in Chicago. Only the Chicago office grants credit, and all credit application forms and credit agreements are mailed by Pennsylvania residents seeking credit to Chicago. . . . Payments are received in Chicago and credited to customers' accounts there. Aldens' credit agreements provide for the retention of a purchase money security interest in merchandise sold on credit, but it does not file any security interest document, does not enforce any security interests, and has a security interest in merchandise unpaid for only to the extent provided by law."

Aldens' credit agreement which is used nationally provides for a monthly service charge of 1.75 percent on balances of $350 or less, an annual percentage rate of 21 percent, and a monthly service charge of 1 percent on the portion of the balance in excess of $350, an annual percentage rate of 12 percent. The credit agreement complies with the Federal Truth-in-Lending Act, the applicable regulations of the Board of Governors of the Federal Reserve System, and the laws of the State of Illinois (Opinion of the Court of Appeals, 24b).

However, if it were required to comply in addition with the Pennsylvania Goods and Services Installment Sales Act, which limits service charges to an annual percentage of 15% regardless of the amount involved, Aldens would incur additional annual costs of $53,000 simply to meet the special form and handling requirements prescribed for Pennsylvania customers (it would cost Aldens an annual amount in excess of $320,000 to comply with similar statutory requirements in the other states which presently regulate revolving credit charges (379 F. Supp. at 525, 6b)), and Aldens would suffer an annual loss of approximately $750,000 in finance and service charge

revenue from its Pennsylvania customers (Opinion of the Court of Appeals, 24b-25b).[4]

The Decision of the District Court.

Although with some reluctance,[5] the trial court did squarely consider Aldens' argument that since it had no local activities in Pennsylvania, *any* attempted regulation by that state would place a "direct burden" on interstate commerce prohibited by the Commerce Clause. Nonetheless, in seeming reliance on the quarantine cases,[6] the court held that Pennsylvania's power to regulate Aldens was not dependent upon Aldens' physical presence or local activities within the state. Rather, the court found that Aldens' substantial "exploitation of the Pennsylvania market" required it to conform to Pennsylvania installment sales legislation without regard to whether it could be found in the state or conducted any local activities in the state. 379 F. Supp. at 529; 14b. This market exploitation was held to satisfy, as well, the due process requirement that there be some minimum connection between a state

4. These figures do not take into account any possible claims for penalties, multiple damages, repayment of total—rather than merely excess—service charges or costs and attorneys' fees which may be claimed on behalf of Aldens' customers in Pennsylvania, should the opinion of the court of appeals be sustained, or in other states, should the decision be held applicable to their acts regulating similar transactions. Although Aldens does not concede any liability beyond those costs involved in the stipulation, the existence of substantial claims against Aldens is discussed at p. 31, *infra*, Nor do the figures in the stipulation indicate the effect of the decision of the court of appeals on those purely interstate mail order businesses other than Aldens itself.

5. The trial court expressed the opinion that the "direct burden" test was no longer viable, but concluded that it had some appeal in this case ". . . since there appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here." 379 F. Supp. at 527; 10b.

6. See the district court opinion, 379 F. 2d at 529; 14b.

and a foreign corporation over which it seeks to exert regulatory jurisdiction. 379 F. Supp. at 531; 17b-18b.

While conceding that the course of dealings between Aldens and its Pennsylvania customers was "remarkably similar" to that held insufficient to justify imposition of use tax collection duties in **National Bellas Hess,** *supra,* the district court found that case distinguishable for both Commerce and Due Process Clause purposes because it "concerns state taxation." 379 F. Supp. at 528, 531; 11b, 17b.

The Decision of the Court of Appeals.

The court of appeals affirmed, but on the basis of an analysis substantially different from that of the district court. Briefly stated, the court of appeals treated Aldens' entire argument as an attack on the Pennsylvania statute as a constitutionally impermissible choice-of-law rule. Finding three constitutional provisions which might possibly form the respective bases for such a contention, it proceeded to dismiss each of them. First, it found the Due Process Clause inapplicable on the ground of this Court's decisions in the "long arm" service of process field, refusing to see any distinction between a state's judicial jurisdiction and its regulatory jurisdiction, but distinguishing **National Bellas Hess** as involving "the higher burden" appropriate to tax cases (29b). Next it turned to the Full Faith and Credit Clause—never raised by the parties—and concluded that that provision was equally inapplicable[7] (31b).

7. The Full Faith and Credit Clause would have been applicable to this action only if Aldens were required to disobey Illinois regulations in order to obey those of Pennsylvania. Since both states regulate only the maximum service charges permissible, it is clear that, by following the more restrictive of the two statutes, Aldens would be violating neither. Similarly, by including all of the provisions required by either state in revolving credit agreements, Alden would be complying with both statutes. The question in this case is simply whether Aldens must follow Pennsylvania law with respect to agreements entered in Illinois when its only contacts with Pennsylvania are through interstate commerce.

Finally, it dismissed Aldens' Commerce Clause arguments without even addressing Aldens' chief contention that a state may not regulate activities exclusively in interstate commerce conducted by a company which engages in no local activity whatever in the regulating state (31b-42b). Instead, the court read Section 111(b) of the Federal Truth in Lending Act, 15 U. S. C. § 1610(b), as a congressional charter for state regulation of the terms of interstate credit transactions, apparently even in the case of those transactions which the Commerce Clause would have forbidden the states to regulate before the adoption of the Truth in Lending Act (34b-35b, 39b, 41b). Once again, the court distinguished **National Bellas Hess** as a tax case and found **Allenberg** not controlling in the light of its interpretation of Section 1610(b).

REASONS FOR GRANTING THE WRIT.

I. The Due Process Clause Forbids a State To Undertake the Extraterritorial Regulation of the Terms of Mail Order Sales to Residents of the Regulating State When Those Sales Are Consummated Outside the Regulating State and the Seller Engages in No Local Activity in the Regulating State.

This proposition would appear to be self-evident. Nevertheless, the court of appeals did not discuss the Due Process Clause question at all in terms of the extraterritorial application of a Pennsylvania statute. Instead, it suggested that the Due Process Clause requires no more than that the state have an "interest" in regulating a transaction, regardless of where the conduct regulated by the statute occurs. However, if the issue were state interest alone, Illinois could plainly have required **National Bellas Hess** to engage in the collection of use taxes from Illinois residents, since as the court itself conceded "[n]o state interest rates so high in the state scale of values as the state sovereign's fisc." (29b). Yet, it was precisely that duty of collecting a use tax which this Court struck down in **National Bellas Hess.** The reason is clear: the issue is not one of state interest but of state power, and this is the first case to suggest that the "minimum connection" between the foreign company and the regulating state necessary to establish that state's power to regulate may be satisfied where the foreign company has no local activity whatever in the regulating state.

In purporting to find the requirement of local activities obviated by the so-called interest analysis approach, the court of appeals relied on the "long arm" service of process cases which it read to define a rather low thres-

hold of state interest sufficient to justify "**any**" exercise of state sovereignty (27b). However, the "minimum contacts" test for establishing **in personam** jurisdiction is based on a totally different balance of interests and reflects a policy which is irrelevant to the question of a state's extraterritorial regulatory power.

In **Travelers Health Association v. Virginia,** 339 U. S. 643, 648-49 (1950), on which the courts below relied, the Court upheld service upon a foreign corporation, basing its holding on the rationale applicable to questions of judicial jurisdiction:

> ". . . if Virginia is without power to require this Association to accept service of process . . . , the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policy holders could afford the expense and trouble of a Nebraska law suit."

Thus, on the one side of the Due Process balance is the concern that unless a small customer claim were afforded the home forum, the cost of bringing an action would be prohibitive and would, in effect, render a foreign corporation immune from suit. **McGee v. International Life Ins. Co.,** 355 U. S. at 223. Conversely, there is no burden on the foreign corporation beyond the expense of responding to a proper suit in a less convenient forum. The corporation is subjected to no new liability and, regardless of where a claim is tried, the substantive law will in all probability be the same. Thus, since the burden is minimal, the contacts justifying its imposition may also be slight.

The burden involved in submitting to a state's regulatory jurisdiction is different in kind from the purely procedural effects of judicial jurisdiction: it involves sub-

stantive requirements which, as here, alter the rights and liabilities of the out-of-state corporation. The test for determining whether a legislative regulation is invalid because it attempts extraterritorial application, therefore, is different from and more stringent than that for personal jurisdiction over an out-of-state merchant. See Note, **Corporate Registration: A Functional Analysis of "Doing Business"**, 71 Yale L. J. 575, 585-86 at nn. 54, 56 and accompanying text.

Under this analysis, the present regulation is plainly impermissible in due process terms. Arranged in ascending order of burden, a state may require a non-resident corporation with sufficient in-state contacts to (1) submit to the personal jurisdiction of its courts, (2) register to do business in the state, and (3) pay taxes to the state or otherwise submit to regulation by the state. Concededly, in the first instance, the states have vast, but not unlimited,[8] power to extend the jurisdiction of their courts even when the in-state activities of the party over whom jurisdiction is sought are exclusively or almost exclusively interstate in nature. But in the second instance, the right to require registration of a foreign corporation plainly depends upon the existence of some local activity separable from interstate commerce. This being so, there can be no doubt that the states cannot take the third step and impose taxes or regulations on business or individuals unless there are local contacts with the regulating state at least as clear and extensive as those which would permit the state to require registration of a foreign corporation. The Attorney General has conceded that Aldens need not register in Pennsylvania (53a); it follows that the Due Process Clause forbids Pennsylvania to subject Aldens to the heavier burden of regulation.

8. *See* **Hanson v. Denckla,** 357 U. S. 235 (1958).

That the due process requirements for a state's exercise of its regulatory jurisdiction are qualitatively different from those applicable to service of process is obvious from a review of those cases on which the court of appeals relied to carry its purely "interest analysis" into the area of substantive regulation (28b). Both this Court's opinion in **Hoopeston Co. v. Cullen,** 318 U. S. 313 (1943), and Justice Douglas' concurring opinion in **Travelers Health Ass'n v. Virginia,** 339 U. S. 643, 651 (1950), specifically relied not alone on the state's abstract interest in the transactions in question, but also on the local activities carried on in the regulating state which Justice Douglas found absolutely necessary to regulatory jurisdiction.

In **Hoopeston,** the Court held that a reciprocal insurer in Illinois could be subjected to New York law even though all its contracts with New York residents were signed in Illinois. However, the Court emphasized, and distinguished **Allgeyer v. Louisiana,** 165 U. S. 578, on the basis of, the extensive local contacts between New York and the foreign business sought to be regulated, *e.g.* the insured property was located in New York, the insurer's agents frequently visited subscribers in New York to encourage the reduction of fire hazards or to investigate losses, the company reserved the right to rebuild, repair or replace property in New York and, in fact, the insurer had been licensed to do business in New York for years. 318 U. S. at 317-319. Accordingly, New York's "interest" in **Hoopeston** stemmed from and was tied to the substantial business carried on by the foreign insurer within New York's territorial jurisdiction.

That this is the test of a state's power to regulate was made crystal clear by Justice Douglas who, alone among the members of the Court, would have gone beyond the service of process question which was the sole issue before the Court in **Travelers,** 339 U. S. at 651. Justice Douglas would have sustained Virginia's regulatory jurisdiction,

but only upon the grounds that the insurer had physically entered the state through its use of existing plan members as solicitors of new business. He stated, 339 U. S. at 654 (concurring opinion):

> "This device for soliciting business in Virginia may be unconventional and unorthodox; but it operates functionally precisely as though appellants had formally designated the Virginia members as their agents. Through these people appellants have realistically entered the state, looking for and obtaining business. Whether such solicitation is isolated or continuous, it is activity which Virginia can regulate."

Justice Douglas clearly distinguished the case from one in which the foreign corporation has no local contacts with the regulating state, *i.e.* "[a] state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesman or solicitors to obtain business for it within the state," 339 U. S. at 653-654.

This is precisely the distinction which this Court refused to repudiate in **National Bellas Hess v. Department of Revenue,** 386 U. S. 753, 758 (1967), *i.e.*, between "mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."

It is anomalous, to say the least, that while the court of appeals saw no meaningful distinction between the purely procedural considerations involved in the service of process cases and the question of substantive regulatory jurisdiction at issue here, it dismissed **Bellas Hess** as totally inapposite because, in its view, the regulation in that case concerned taxation.

Indeed, having dismissed this Court's decisions in **Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.,** 292 U. S. 143 (1934), **New York Life Insurance Co. v. Dodge,** 246 U. S. 357 (1918), and **Allgeyer v. Louisiana,** 165 U. S. 578 (1897), all of which invalidated, on due process grounds, the extraterritorial application of forum law to contracts made elsewhere, on the grounds that these cases "must be deemed to have been limited by the more recent interest analysis approach of cases such as **McGee** . . ., **Travelers** . . . and **Hoopeston** . . .," the court of appeals then refused to apply this "more recent" analysis to **National Bellas Hess, Inc. v. Dept. of Revenue,** 386 U. S. 753 (1967) which "held that a provision of the Illinois use tax act which imposed a duty on an out-of-state mail order seller to collect Illinois use taxes was unconstitutional." Opinion of the Court of Appeals, 28b.

In reaching this conclusion, the court completely abandoned the "interest" analysis which provided the basis for its determination that Pennsylvania could regulate Aldens on the sole ground the higher finance charge permitted by Illinois law would cost Pennsylvania citizens a substantial amount of money. The court held that **National Bellas Hess** was inapplicable as a tax case even though "[n]o state interest rates so high in the state scale of values as the state sovereign's fisc." Opinion of the Court of Appeals, 29b.

In fact, **National Bellas Hess** would have required no more of the out-of-state seller than that it serve as the collection agent for taxes admittedly due to the regulating state by that state's citizens. Indeed, as the opinion of this Court states, foreign sellers were compensated for their activity in collecting Illinois' use taxes. It is plain that this Court's opinion in **National Bellas Hess** can have established no other principal than that asserted by Aldens here, to wit, the Due Process Clause prohibits the expor-

tation of a regulatory duty to foreign sellers whose only contact with the regulatory state is through interstate commerce.[9]

2. The Commerce Clause Prohibits a State From Regulating Purely Interstate Mail Order Sales to Its Residents When the Foreign Seller Engages in No Local Activity Whatever in the Regulating State.

This is so because, when there is no local activity by the mail order seller sought to be regulated, the burden of state regulation must fall directly and impermissibly upon interstate commerce.

This is the essence of Aldens' "direct burden" argument and the meaning of this Court's decisions in **National Bellas Hess** and **Allenberg.** However, any discussion of this analysis is conspicuously absent from the four categories of cases which the court of appeals proposed as an exhaustive listing of those situations in which "the commerce clause limits the power of a state to impose its choice of law on any transaction that is within the broad ambit of congressional power to regulate interstate com-

9. There is a related due process principle which is applicable where, as here, a state asserts jurisdiction to enforce a penal law; that is, that even if Pennsylvania did have the power to regulate contracts entered in Illinois by Pennsylvania residents—which it clearly does not—it could not do so under the guise of labeling these as Pennsylvania contracts as the Pennsylvania Act does. Thus, in **Turner v. United States,** 396 U. S. 398, 407-08, n. 8 (1970), this Court refused to countenance federal regulation of narcotics and firearms dependent on the presumption that they were imported or transported in interstate commerce. Putting aside the question of whether Congress had the power to make possession itself a crime, this Court would not permit Congress to define a different offense by relying on inferences contrary to fact. And in so holding, the Court followed its similar holdings in **Leary v. United States,** 395 U. S. 6, 34, 37 (1969); **United States v. Romano,** 382 U. S. 136, 142-44 (1965); **Harris v. United States,** 359 U. S. 19, 23 (1959); **Roviaro v. United States,** 353 U. S. 53, 62-63 (1957); and **Tot v. United States,** 319 U. S. 463, 472 (1943).

merce. . . ." (32b). Specifically, the court held that any state law, whether a police regulation, tax or otherwise, is valid which is not (1) preempted by comprehensive federal legislation, or which (2) while not displaced by federal legislation does not (a) affect a subject matter requiring a uniform national rule or (b) discriminate against persons engaged in interstate commerce or (c) impose a burden on interstate commerce in excess of any value attaching to the state's interest in imposing the regulation (Opinion of the Court of Appeals, 32b-34b).

Upon concluding that Pennsylvania's attempted regulation did not fall within any of these categories, the court then pronounced such regulation valid under the Commerce Clause.[10]

However, neither does any of the court's categories explain the basis upon which this Court found the state enactments in **National Bellas Hess** and **Allenberg** repugnant to the Commerce Clause. While the court attempted to classify both as what it describes as "2(c)" cases, *i.e.*, cases involving a balancing of the burden on interstate commerce against the weight of the state interest involved, it is clear that this Court did not undertake such a judicial weighing in either case. Rather, it found that in the absence of any localization or intrastate character, the exclusively interstate transactions involved were simply removed by the per se application of the Commerce Clause from

10. Aldens argued below that the Pennsylvania statute is both discriminatory and unduly burdensome (categories 2(b) and 2(c)), see Brief for Appellant, pp. 27-34. For purposes of this Petition, however, Aldens concedes that these issues are not independently worthy of consideration by this Court on certiorari and relies upon the fact that the Pennsylvania regulation is both discriminatory and unduly burdensome solely in support of its position that the Commerce Clause prohibits the application of the Pennsylvania Goods and Services Installment Sales Act to Aldens because that application imposes an impermissible direct burden on pure interstate commerce.

the jurisdiction of the states to tax, regulate or otherwise burden.

Similarly, the court of appeals simply disregarded the fact that in *every* other case it relied upon, the state law in question was tied to and fell upon local activities of the foreign company sought to be taxed or regulated within the regulating state, which activities were distinct and separable from the company's purely interstate transactions.

In holding that Pennsylvania could regulate the transactions involved in this case, the court of appeals, following the lead of the trial court, rejected the direct authority of this Court's decision in **National Bellas Hess** on the grounds that it was a tax case and, therefore, inapplicable to a statute which regulates the substantive provisions of an out-of-state contract.[11] While Aldens argued, and we believe correctly, that **National Bellas Hess** was not a tax case, but one in which the state sought to impose certain tax collection duties on an out-of-state seller, much as Pennsylvania is attempting to impose its regulatory scheme on Aldens (Brief for Appellant, pp. 17, 20-21), the more important point is that the analysis in **National Bellas Hess** is not unique to a tax case, but is equally applicable to any attempted exertion of state power directly upon interstate commerce.[12] Whether or not the different factors involved in tax and regulation cases would weigh differently and command different results upon a balancing of competing

11. Opinion of the Court of Appeals, 40b.

12. The court of appeals itself recognized the inappropriateness of its own "tax case" classification as a ground for distinguishing **National Bellas Hess.** In footnote 16 the court stated that it need not determine "whether the more conventional separate classification of [tax] cases is appropriate" (40b), and in fact, suggested elsewhere in its opinion that the distinction between a tax case and one involving regulation "should not be significant" in terms of the commerce clause (34b).

state and federal interests, this Court did not undertake such a balancing of interests in **National Bellas Hess,** but rather made the threshold determination that Illinois was without power to impose a burden on "mail order sellers . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," 386 U. S. at 758.

Although Aldens conducts its interstate business in a manner factually indistinguishable from National Bellas Hess, and although the trial court in this case specifically noted that "there appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here," 379 F. Supp. at 527, 10b, the court of appeals refused even to consider the threshold question of whether the incidence of Pennsylvania's attempted regulation fell within an area of pure interstate commerce subject to regulation only by the Federal government since it involved no local activity which would justify state regulation. Rather, the court simply assumed that the substantial interest which, under the Due Process Clause, it held Pennsylvania had in regulating Aldens' transactions with Pennsylvania residents was also an interest sufficient to take the Pennsylvania statute out of the absolute bar of the Commerce Clause. Yet, even if the court of appeals were correct in concluding that the "long arm" service of process cases constitute controlling authority for permitting a state to regulate out-of-state activities under the Due Process Clause, this analysis in no way justifies an unprecedented conclusion that the states are similarly freed from the prohibitions of the Commerce Clause when they seek to regulate purely interstate transactions absent any local activities to support that regulation.

It is true that the Commerce Clause and the Due Process Clause issues in **National Bellas Hess** were similar,

386 U. S. at 756. However, this is because the Commerce Clause analysis never had to proceed beyond the question whether, there being no local aspects of National Bellas Hess interstate business which would provide Illinois even that "minimum connection" necessary to satisfy the demands of due process, there could conceivably be any subject of local concern not absolutely withdrawn by the Commerce Clause from Illinois' jurisdiction to apply its laws to transactions in interstate commerce. In other words, having failed to take the initial Due Process Clause hurdle, the challenged regulation could not possibly meet the more stringent Commerce Clause requirements.

Since, at least in this context, **National Bellas Hess** is not meaningfully distinguished on the ground that it is a tax case, the court of appeals should have reached the same result here: that Pennsylvania's attempted regulation of Aldens' interstate business is repugnant to both the Due Process and the Commerce Clauses. However, having decided to depart from all precedent under the Due Process Clause to hold that Pennsylvania had sufficient interest to regulate a foreign company with absolutely no local activities in Pennsylvania, the court of appeals then compounded its error by failing to inquire whether such an interest, independent of any local activities, could be other than a regulation of pure interstate commerce prohibited the states by the *per se* effect of the Commerce Clause. That such further inquiry was required is made clear throughout the decisional history of the Commerce Clause and was most recently reiterated by this Court, less than a year ago, in its decision in **Allenberg Cotton Co., v. Pittman,** 419 U. S. 20 (1974).

In its endeavor to support its refusal to recognize Aldens' "direct burden" argument, the Court of Appeals completely misread this Court's decision in **Allenberg,**

which affirmed the validity of the "direct burden" test in the clearest possible terms. **Allenberg** simply cannot be characterized as a case where "[r]ecognizing that the purpose of the Mississippi statute was to encourage local qualification by foreign corporations, the Court held that this state interest was an insufficient justification for the very substantial burden which denial of judicial enforcement of the forward contract placed upon interstate commerce in cotton" (Opinion of the Court of Appeals, 41b). This Court did not discuss what the justification for the Mississippi statute was, and it certainly did not even consider in **Allenberg** the relative weight to be afforded competing state and federal interests.[13] Rather, it found the case indistinguishable from **Dahnke-Walker Milling Co. v. Bondurant,** 257 U. S. 282 (1921), where it had held that a state simply could not regulate a transaction which "though having intrastate aspects, was in fact 'a part of interstate commerce.'" 419 U. S. at 30, *quoting* **Dahnke-Walker,** 257 U. S. at 292.[14]

There is absolutely nothing in **Allenberg** to suggest that this Court was applying, even implicitly, a balance test. Although the Court of Appeals claimed that it was "judicial weighing which produced one result in **Eli Lilly & Co. v. Sav-on-Drugs, Inc.,** 366 U. S. 276 (1961), and another in Allenberg" (41b), this Court, in fact, found **Lilly**

13. In fact, as pointed out in the dissenting opinion of Mr. Justice Rehnquist, who alone considered a balancing approach to be relevant, the burden of the Mississippi Statute in terms of compliance costs was only $500 and the disclosure or certain operating information, while the corresponding state interest in providing its citizens information about and access to a company which regularly purchased Mississipi cotton was not insubstantial. 419 U. S. at 40-42 (dissenting opinion).

14. Again as emphasized in the dissent, there were numerous intrastate aspects in **Allenberg** not present here. 419 U. S. at 34-35 (dissenting opinion).

"not in point" because "[t]here the Court found that the foreign corporation had an office and salesman in New Jersey *selling drugs intrastate*. Since it was engaged in an intrastate business it could be required to obtain a license even though it *also* did an interstate business." (419 U. S. at 32 (Emphasis supplied)).

In short, **Allenberg** is not a balancing case, but involves application of the *per se* rule that a state may not constitutionally impose a burden which falls directly on interstate commerce. There is no question that **Allenberg** is controlling here to invalidate a Pennsylvania statute which would regulate the very prices charged in exclusively interstate transactions.[15]

To summarize then, no effort by the court of appeals to bring its decision into line with traditional Commerce Clause analysis can alter the fact that, as noted by the trial court, but disregarded by the court of appeals, ". . . there appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here." 379 F. Supp. at 527, 10b. Nor should there be in light of this Court's decisions in **National Bellas Hess** and **Allenberg.**

If Pennsylvania can regulate Aldens, so can every other state and even local governments. To contemplate what would happen if Aldens had to conform with the different maximum and multiple rates for varying amounts of credit prescribed by various states and with the notice requirements, type sizes, mandatory or forbidden provisions and remedies provided or excluded, all varying widely from jurisdiction to jurisdiction, beggars the imagination. Surely, no one would say that such a result

15. "To regulate the price for such transactions is to regulate commerce itself." **Carter v. Carter Coal Co.**, 298 U. S. 238, 326 (1936) (Cardozo, J., dissenting), quoted in **Sunshine Anthracite Coal Co. v. Adkins**, 310 U. S. 381, 394 (1940).

would not constitute a burden on interstate commerce. As this Court said in **National Bellas Hess:**

> ". . . if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a 'fair share of the cost of the local government.'
>
> "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."

3. When the Congress Preserved the Right of the States To Regulate Finance or Service Charges on Open End Credit Transactions, It Acted Solely To Preserve Existing State Powers and in No Way Authorized the States To Engage in Regulation Previously Forbidden by the Commerce Clause.

Having rejected Aldens' "direct burden" argument and having read **Allenberg** to support its balance of interest analysis, the court of appeals then distinguished

Allenberg on the ground that there was no need—"and there may be no room"—for that kind of judicial weighing here since Congress had "used the legislative scales" when, in Section 111(b) of the Federal Truth in Lending Act, 15 U. S. § 1610(b), it "expressly deferred to the states on the matter of consumer credit interest rates" (Opinion of the Court of Appeals, 41b). Although the issue was neither briefed nor argued, the court relied exclusively on Section 1610(b) both as evidence that the subject of consumer credit charges was not one requiring a uniform national rule (34b-35b) and further, as an indication that Congress had, in fact, abandoned the field to the states so as to remove any limitations on state power to regulate the credit charges which would otherwise arise from the *per se* effect of the Commerce Clause (39b).[16]

With full deference, this construction of Section 1610(b) on which the opinion below actually rests distorts both the plain meaning of the statute and the express legislative intent which underlies it. The only meaning of Section 1610(b) is that the Congress has not required uniform rates on finance or service charges under the Truth in Lending Act. While this legislation preserves to the states their preexisting right to regulate these charges to the degree that the Commerce Clause or other constitutional provisions do not forbid such regulation, it was in no sense a permanent decision not to undertake uniform regulation in this field but to turn the subject matter over to the states. Indeed, Representative Leonor K. Sullivan, one of the principal sponsors of the Act, made it quite clear that a federal service charge ceiling originally included in the legislation had been withdrawn only because it could not yet muster

16. In its brief to the court of appeals, appellee did quote Section 1610(b), but relied on it for no more than the self-obvious proposition that uniformity in the area of consumer credit charges is not "presently" required. Brief for Appellee, p. 16.

sufficient congressional support; she expressed the strong belief that uniform service charge rates would and should eventually be enacted by the Congress. See H. R. No. 1040, U. S. Code Cong. & Adm. News, 90th Cong., 2d Sess. (1968) at p. 2001.[17] Indeed, if national uniformity in service and finance charges for open end credit transactions are not yet legally required by the Federal Truth in Lending Act, there is a general recognition of the need for such uniformity to facilitate interstate business transactions.

A simple inspection of the language of Section 1610(b) makes it obvious that, while the Congress was carefully attempting to avoid pre-emption in those areas where the states had previously had the power to act,[18] Congress had no intention to broaden state control of consumer credit interest rates where it was otherwise limited by the Commerce Clause. Thus, the court of appeals' con-

17. Not only do the remarks of various sponsors and floor managers of H. R. 11601 make it clear that the Congress was working toward a complete and comprehensive uniform program of consumer credit regulation, see e.g. 14 Cong. Rev. 14385, 14490, 14492 (1968), but the future actions of the Congress indicate ongoing legislative activity in this direction. Even in the brief period since the Federal Truth in Lending Act was adopted, Congress has passed two additional acts regulating other aspects of consumer credit: the Fair Credit Billing Act, pub. L. 93-495, Tit. III, 88 Stat. 1511, 15 U. S. C. §§ 1601-02, 1610, 1631-32, 1637, 1666-66j, (October 28, 1974), and the Equal Credit Opportunity Act, pub. L. 93-494, Tit. V, 88 Stat. 1521, 15 U. S. C. §§ 1691-91e (October 28, 1974), both of which took effect on October 28, 1975. In addition, Representative Frank Annunzio, Chariman of the House Consumer Affairs Committee, announced this past summer that he intends to introduce a Federal Debt Collection Act. See CCH Consumer Credit Guide, Report Letter No. 177 (July 18, 1975).

18. The House Report makes clear that Congress was sensitive to the possibility that the "finance charge" required to be disclosed might be confused with an interest rate so as to prejudice lenders disclosing finance charges in excess of state usury laws. This appears to be a primary reason why Congress took such pains to declare that it did not intend to invalidate otherwise valid state interest ceilings. *See e.g.* U. S. Code Cong. & Adm. News, 90th Cong. 2d Sess. (1968) at p. 1977.

struction of Section 1610(b) gives only one-sided effect to the legislative disclaimer of any intent to "annul, alter, or *affect in any manner* the meaning, scope or applicability of the laws of any state . . . [regulating consumer credit charges]." (Emphasis supplied). It completely ignores the final clause of Section 1610(b) which states, "nor does this sub-chapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply."

In fact, the Conference Report (No. 1397), states explicitly "the Congressional intention not to preempt any field *in which state law would be valid in the absence of this chapter.*" (Emphasis supplied). U. S. Code Cong. & Adm. News, 90th Cong. 2d Sess. (1968) at p. 2028. Conversely, it seems absolutely clear that Congress did not intend to abandon to state regulation any area which, prior to the enactment of the Federal Truth in Lending Act and Section 1610(b), was removed from the jurisdiction of the states by the Commerce Clause.[19]

19. This may be seen most clearly from a comparison of the language of Section 1610(b) with that of the McCarran-Ferguson Act where Congress did, in fact, "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it. . . ." **Prudential Ins. Co. v. Benjamin,** 328 U. S. 408, 431 (1946).

The McCarran-Ferguson Act, 15 U. S. C. §§ 1011-1015, provides in pertinent part:

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

(15 U. S. C. § 1011)

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

To read Section 1610(b) otherwise, as the court of appeals has done, is to declare a new rule of constitutional construction, that where Congress acts in, but declines to preempt, a field where the states previously had limited power to act, the burden is on Congress to declare expressly that it has not thereby ceded to the jurisdiction of the states, its exclusive power to regulate purely interstate commerce. For it is only by reading Section 1610(b) to **remove** all Commerce Clause limitations in the challenged area of state regulation that **Allenberg** can be meaningfully distinguished and Pennsylvania held to have power to impose its regulatory jurisdiction upon transactions exclusively in interstate commerce.

It seems possible that the court of appeals was not impressed by Aldens' "direct burden" argument and was willing to read Section 1610(b) as an abandonment of exclusive federal jurisdiction under the Commerce Clause because it somehow failed to comprehend the nature and magnitude of the burden on interstate commerce which its decision here would condone. With all due deference, the court of appeals simply misapprehends the issues involved when it states that "Pennsylvania's regulation of the time-

19. (Cont'd.)

> purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . ."

(15 U. S. C. § 1012).

Similarly, in Section 85 of the National Bank Act, 12 U. S. C. § 85 (1933), Congress **explicitly** provided that any national bank created thereunder would be allowed to charge interest either at the rate allowed by the law of the state in which it was located or at a rate fixed in accordance with the discount rate at the Federal Reserve Bank in the federal reserve district in which it was located, whichever is higher, or at any different rate specified by the state of location for banks organized under the laws of that state.

Thus, in this case, Congress expressly adopted the laws of the several states as permissive regulations upon national corporations within the territorial jurisdiction of the respective states.

price differential in mail order sales by the Philadelphia mail order house [buying merchandise in interstate commerce, for resale in Pennsylvania], therefore, imposes on interstate commerce the same burden as in the case of sales by Aldens" (Opinion of the Court of Appeals, 37b).

The purpose and effect of the Commerce Clause is not to insulate from state regulation all business concerns which in one way or another conduct activities in interstate commerce, but to protect the operation of that commerce itself from burdensome state regulation. (For example, the antitrust laws are said to protect, not individual competitors, but the forces of competition itself). In other words, the Commerce Clause protects a federal right of free access to every market in the country which is not dependent on and may not be encumbered by state regulation. *See* **Hood & Sons v. Du Mond,** 336 U. S. 525, 539 (1949), *quoted* in **Allenberg,** 419 U. S. at p. 32. To the extent that a business identifies itself to a particular state, it becomes subject to reasonable regulation by that state. However, where, as here, a business eshews all the benefits of such identification, it is operating solely within its rights as a federal citizen so to speak and is subject to regulation solely by the federal government.

Aldens operates as a purely interstate business (except with respect to its home State of Illinois where it is duly regulated). It asks nothing and takes nothing from Pennsylvania except the market access guaranteed to it by the Commerce Clause. Yet, the effect of the decision below is to destroy Aldens' access to any state market except upon the terms specified by that state. Thus, it is rendered a Pennsylvania company for purposes of its sales to Pennsylvania residents, a Delaware company insofar as it sells to citizens of Delaware, and so on. The power to regulate interstate commerce heretofore considered to be within the exclusive jurisdiction of the federal government is thus, ipso facto apportioned among the fifty states.

As a result, numerous states have already come forward to claim their share of the corpse of federal commerce power. Two days after the decision of the court of appeals was entered, a class action was filed on behalf of one of Aldens' Pennsylvania customers and all others similarly situated claiming treble damages as a result of finance charges in excess of those specified by Pennsylvania law. **Wallace v. Aldens,** Civil No. 4262 (C. P. Phila. Co. filed August 29, 1975). Similar class actions were filed in Connecticut following the decision of the district court here, claiming damages for finance charges in excess of Connecticut law. **Solevo v. Aldens, Inc.,** Civil No. 74-313 (D. C. Conn. filed December 17, 1974); **Solevo v. Aldens, Inc.,** No. 143975 8 (Super. Ct. Conn. filed June 4, 1975). And, although the Superior Court of Okanogan County, Washington, has not yet ruled on the propriety of class action status in an action commenced there several years ago, it relied on the decision below to enter a memorandum opinion on the merits holding Aldens liable for damages under Washington law. **Burke v. Aldens, Inc.,** No. 19096 (Okanogan Co. November 19, 1975). Meanwhile, the Attorneys General of Michigan and Iowa have brought enforcement actions against Aldens to compel compliance with local law. **Kelley v. Aldens, Inc.,** No. 75-18013-C. P. (Ingham Co., filed September 18, 1975). **State of Iowa ex rel. Turner v. Aldens, Inc.,** Equity No. CE 4-2164 (Polk Co., filed September 29, 1975). Since the decision of the court of appeals, the Attorneys General of California, Missouri and West Virginia have notified Aldens of their interest in filing similar actions. In addition Aldens has felt compelled to protect itself by suing for declaratory judgments as it did here to prevent enforcement against it of Wisconsin, Iowa and Oklahoma law.[20]

20. **Aldens, Inc. v. Warren,** Civil Action No. 72-C-405 (W. D. Wisc., filed October 6, 1972); **Aldens, Inc. v. Turner,** Civil Action No. 74-182-2 (S. D. Iowa, filed July 12, 1974); **Aldens, Inc. v. Ryan,** Civil Action No. 75-0458-D (W. D. Okla., filed June 3, 1975).

And all of this is in spite of the fact that this Court noted upon virtually identical facts in **National Bellas Hess** that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." 386 U. S. at 759. Unless this comment is to become no more than a passing reflection on the glory which was the Commerce Clause, this Court should take jurisdiction to reaffirm the crucial constitutional principles which dictated its decisions in **National Bellas Hess** and **Allenberg** and should be controlling here.

CONCLUSION.

For the reasons hereinbefore set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

ALDENS, INC., Plaintiff,

v.

ISRAEL PACKEL, Attorney General of the Commonwealth of Pennsylvania, Individually and in his official capacity, Defendant.

Civ. No. 73-674.

United States District Court,
M. D. Pennsylvania.
August 2, 1974.

Ralph S. Snyder, Gerald J. St. John, David S. Petkun, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., for plaintiff.

Lawrence R. Richard, Asst. Atty. Gen., Div. of Consumer Affairs, Harrisburg, Pa., for defendant.

OPINION.

MUIR, District Judge.

Plaintiff Aldens, Inc., (Aldens), an Illinois corporation engaged in the business of of interstate mail order sales to purchasers who are located in all states of the Union, filed this action seeking a declaratory judgment that application of the Pennsylvania Goods and Services Installment Sales Act, 69 P. S. § 1101 et seq. (the Act), to Aldens' transactions with Pennsylvania residents is unconstitutional. Defendant, Attorney General for the Commonwealth of Pennsylvania, threatens to enforce the Act against Plaintiff. The Act provides, *inter alia*, for the form and content of

retail installment contracts and monthly billing statements and prohibits finance charges for revolving charge accounts in excess of an annual rate of 15%.[1] Aldens utilizes a standard credit agreement for all transactions involving

1. Pertintent sections of the Act provide as follows:

69 P. S. § 1103.

"Contracts within Act.

For the purposes of this act a retail installment contract, contract, retail installment account, installment account, or revolving account is made in Pennsylvania and, therefore, subject to the provisions of this act if either the seller offers or agrees in Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania buyer accepst or makes the offer in Pennsylvania to buy, regardless of the situs of the contract as specified therein.

Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania.

Any solicitation or communication to buy, verbal or written, originating within the Commonwealth of Pennsylvania from a resident buyer of Pennsylvania, but forwarded to and received by a retail seller outside the Commonwealth of Pennsylvania shall be construed as an acceptance or offer to buy in Pennsylvania."

69 P. S. § 1901.

"Establishment of account.

A retail installment account may be established by the seller upon the request of a buyer or prospective buyer. A statement setting forth the rates of service charge, which shall not exceed those authorized by section 904, and describing the balance on which such service charge will be computed, shall be printed in type no smaller than eight point in every application form used by the seller and shall be stated to the applicant when such installment accounts are negotiated by telephone.

Subject to the other provisions of this article, a retail installment account may be established by a financing agency on behalf of one or more sellers from whom the financing agency may, with the buyer's consent purchase or acquire indebtedness of the buyer to be paid in accordance with the agreement."

69 P. S. § 1904.

"Rates of service charge on accounts.

Subject to the other provisions of this article the seller or holder of a retail installment account may charge, receive and collect the service charge authorized by this act. The service charge

customers throughout the United States. This credit agreement does not comply with the form and content requirements of the Act, and provides for a monthly fi-

1. (Cont'd.)

shall not exceed the following rates computed on the outstanding balances from month to month:

(a) On the outstanding balance, one and one-quarter percent (1¼%) per month.

(b) A minimum service charge of seventy cents (70¢) per month may be made for each month if the service charge so computed is less than that amount: such minimum service charge may be imposed for a minimum period of six months.

(c) The service charge may be computed on a schedule of fixed amounts if as so computed it is applied to all amounts of outstanding balances equal to the fixed amount minus a differential of not more than five dollars ($5), provided that it is also applied to all amounts of outstanding balances equal to the fixed amount plus at least the same differential."

69 P. S. § 1905.

"Monthly statement.

The seller or holder of a retail installment account shall promptly provide the buyer with a statement as of the end of each monthly period (which need not be a calendar month) setting forth the following:

(a) The balance due to the seller or holder from the buyer at the beginning of the monthly period.

(b) The dollar amount of each purchase by the buyer during the monthly period and (unless a sales slip or memorandum of each purchase has previously been furnished the buyer or is attached to the statement) the purchase or posting date, a brief description and the cash price of each purchase.

(c) The payments made by the buyer to the seller or holder and any other credits to the buyer during the monthly period.

(d) The amount of the service charge, and the following statement: The service charge herein contained does not exceed the equivalent of fifteen percent (15%) simple interest per annum on the unpaid balance except that a minimum service charge of seventy cents (70¢) per month may be made.

(e) The total balance in the amount at the end of the monthly period.

(f) A legend to the effect that the buyer may at any time pay his total balance.

The items need not be stated in the sequence or order set forth above; additional items may be included to explain the computations made in determining the amount to be paid by the buyer."

nance charge of 1.75% on balances of $350.00 or less (annual percentage rate of 21%). Because Plaintiff deals from Illinois with its Pennsylvania customers solely through the use of the United States mails and common carriers, it contends that application of the Act to the transactions with Pennsylvania residents is prohibited by the commerce clause, the due process clause of the 14th Amendment, and the postal clause of the United States Constitution.

Defendant Packel answered the complaint denying the unconstitutionality of the Act as applied to Aldens, and asserted a counterclaim in which he seeks declaratory judgment that the Act is constitutional as applied to Aldens and requests an injunction against Aldens' future non-complinace with the Act. Before the Court are cross-motions for summary judgment and Plaintiff's motion for judgment on the pleadings as to Defendant's counterclaim. The parties have entered into a stipulation of facts which contains all facts necessary for the determination of the issues in this proceeding and the Court has ruled on Defendant's objections that certain of the stipulated facts are irrelevant in this case. The following constitutes the factual record in this case:

1. Aldens, Inc. (Aldens), is an Illinois corporation with its only physical location in Chicago, Illinois. The business was established in Chicago in 1902 and has been conduced as a general retail merchandise mail order business in Chicago ever since.

2. Aldens sells merchandise to customers who reside in all fifty states.

3. The credit agreement in use nationally by Aldens provides that it is an Illinois contract governed by Illinois law. The credit agreement provides for a monthly finance

charge of 1.75 percent on balances of $350.00 or less (annual percentage rate of 21 percent) which exceeds the rate permitted by § 904 of the Act, 69 P. S. § 1904, and a monthly finance charge of 1 percent on that portion of the account balance in excess of $350.00 (annual percentage rate of 12 percent). The annual rates are expressed in conformity with Section 226.1(b)(5) of Regulation Z, promulgated by the Federal Reserve Board under the Federal Truth-in-Lending Act. The credit agreement complies with Illinois law and with the Federal Truth-in-Lending Act.

4. Aldens retains title only in the nature of a purchase money security interest in merchandise sold pursuant to the credit agreement with its customers. Aldens does not file any security interest documents, does not enforce any security interest, and has a security interest in merchandise unpaid for only to the extent provided by law.

5. Approximately 7.6 percent of Aldens' annual sales are made to Pennsylvania customers. Sales to Pennsylvania customers amount to approximately $14,900,000 per year. Approximately 27 percent of this amount is derived from cash sales and 73 percent from credit sales. Aldens has approximately 90,000 Pennsylvania credit customers; the average credit account balance is approximately $169.00.

6. Were Aldens to comply with the Pennsylvania Goods and Services Installment Act, it would incur additional annual costs and expenses, and would sustain revenue losses directly attributable to the burden imposed by that Act in excess of the following:

a. Approximate additional costs of preparing catalogs, advertising materials, and credit agreements containing Pennsylvania credit terms; special com-

puter processing and handling costs for Pennsylvania customers in setting up accounts and producing monthly statements. $ 53,000

b. Approximate loss of finance and service charge revenue from Pennsylvania customers 750,000

Total $803,000

7. Were Aldens to comply with the provisions of the varying statutes in those states which presently regulate revolving charge agreements, Aldens would incur additional costs and expenses, aside from the effect of revenue losses due to the reductions in service and finance charges, in an amount in excess of $320,000, annually.

8. Aldens does not have in Pennsylvania any office, distribution house, sales house, warehouse or any other place of business.

9. Aldens does not have in Pennsylvania any agent, salesman, canvasser, solicitor or any other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells.

10. Subject to the security interest described in paragraph 4 hereof, Aldens does not own any tangible property, real or personal, in Pennsylvania.

11. Aldens has no telephone listing in Pennsylvania.

12. Pennsylvania customers are solicited solely by mail from outside Pennsylvania. They order primarily by mail, or occasionally by telephone, to Chicago, Illinois.

13. Aldens does not advertise its merchandise for sale in Pennsylvania newspapers, on billboards in Pennsylvania, or by placing advertisements with Pennsylvania radio or television stations.

14. Aldens is not required to collect and remit the Pennsylvania Use Tax.

15. Aldens mails catalogs to certain Pennsylvania residents about 4 times per year and in addition, mails to them "flyers," which are supplemental advertisements of merchandise, approximately 6 to 8 times per year. Aldens includes advertising material with the customer's monthly billing statement. The catalogs and "flyers" are mailed to persons on Aldens' active Pennsylvania customer list, comprising about 149,000 names. In addition, Aldens rents mailing lists from mailing list brokers (not Pennsylvania firms). Catalogs and "flyers" will be mailed in the year of 1974 to about 2,100,000 Pennsylvania residents on those lists. There may be some duplication between the mailings to names on the rented lists and the mailings to those on on Aldens' customer lists. All Aldens' mailings are to named individuals and none are to "resident" or "occupant."

16. Aldens' procedures used in determining creditworthiness involve the weighing of answers to the items of information called for in the Charge Application. In addition, about 22 percent of the applications are checked against a national credit index service located in New Jersey, and about 23 percent are checked by arrangement with a Chicago, Illinois credit reporting agency, by phoning credit bureaus in Pennsylvania for in-file checks of their records.

17. Application forms for credit accounts with Aldens and credit agreement forms are among the materials mailed by Aldens from its office in Chicago, Illinois to persons within the Commonwealth of Pennsylvania; credit application forms are completed and credit agreements are signed by Pennsylvania residents and are mailed from Pennsylvania to Aldens at its offices in Chicago.

18. Credit is granted only in Chicago and orders are accepted only in Chicago.

19. Merchandise sold to Pennsylvania customers is delivered to these customers by mail or by common carrier, all of the shipments originating outside of Pennsylvania. Merchandise is sent of an f.o.b. point of origin basis and the customer pays the shipping, handling and transportation costs.

20. Aldens is not required to qualify or register to do business in Pennsylvania.

21. Monthly statements are mailed in Chicago by Aldens to Pennsylvania credit customers following the receipt and acceptance of customer's orders. These statements set forth the charges to the customers' accounts and require payment thereof by stated dates to avoid assessments of finance charges.

22. Monthly payments by Pennsylvania customers for merchandise purchased and finance charges assessed under Aldens' credit plan are mailed from Pennsylvania to Aldens in Chicago, and when received in Chicago, are credited to customers' accounts.

23. In the event that a Pennsylvania customer becomes delinquent in the payment of his or her account. Aldens attempts to collect the account by mailing letters and other communications from Chicago to the customer in Pennsylvania and, when appropriate, by telephoning the Pennsylvania customer, from Chicago, to discuss the account and request payment.

24. After an account has been delinquent for 6 months, Aldens writes it off as a bad debt. Aldens turns over approximately one half of the Pennsylvania accounts which have been written off about 2.5 percent of its Pennsylvania receivables) to independent collection agencies located outside of Pennsylvania.

DISCUSSION.

I. *Commerce Clause.*

Plaintiff's chief ground in support of its contention that the Pennsylvania Goods and Services Installment Sales Act is unconstitutional is based upon the commerce clause. Traditional analysis of the commerce clause cases holds that a state statute affecting interstate commerce is constitutional providing that the following criteria are satisfied.

1. That is does not conflict with a federal statute or regulation. McDermott v. Wisconsin, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 574 (1913).

2. That it is not inconsistent with a federal policy. Chicago v. Atchison, T. & S. F. R. Co., 357 U. S. 77, 78 S. Ct. 1063, 11 L. Ed. 2d 1174 (1958).

3. That the field has not been occupied by federal authority. Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 6 S. Ct. 207, 71 L. Ed. 432 (1926).

4. That the subject of the statute is not a national problm. Edwards v. California, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941).

5. That it does not discriminate against interstate commerce. Dean Milk Co. v. Madison, 340 U. S. 349, 71 S. Ct. 56, 95 L. Ed. 329 (1951).

6. That it does not constitute an undue burden upon interstate commerce. Bibb v. Navajo Freight Lines, 359 U. S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959).

While Aldens asserts that the Act is an undue burden upon interstate commerce, it apparently does not contend that the Act fails to fulfill requirements (1) through (4) listed above. But Aldens urges that the Court need never reach the burden determination since the application of the Act to Aldens' transactions with Pennsylvania residents, which are exclusively interstate in character and do not involve any local activity, indicates that the state is attempting to regulate purely interstate transactions. This, Aldens asserts, is a "direct burden" upon interstate commerce, and not an "indirect burden," such as to require an undue burden analysis by the Court. I would have thought that the "direct burden" label was dead, DiSanto v. Pennsylvania, 273 U. S. 34, 44, 47 S. Ct. 267, 71 L. Ed. 524 (1927) (Stone, J., dissenting), and that the present test was whether the state interest involved is outweighed by the national interest in the unhampered operation of interstate commerce. South Carolina State Highway Department v. Barnwell Brothers, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938). This latter test is applied by means of the traditional analysis noted above.

However, the novelty of the factual situation in this case requires that the Court consider Plaintiff's "direct burden" argument. Aldens has no physical presence in Pennsylvania. The agreements between Aldens and its Pennsylvania customers which the Act seeks to regulate are accepted in Illinois by Aldens. Aldens' argument that we must make a threshold determination as to whether Pennsylvania may regulate the contracts between Aldens and Pennsylvania residents, where the only local activity on the part of Aldens is through the United States mails and common carrier, has some appeal since there appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here.

Aldens places its chief reliance upon the case of National Bellas Hess v. Department of Revenue of Illinois, 386 U. S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). That case involved a Missouri mail order house, National Bellas Hess (National), which conducted its business entirely through the mails and by common carriers to its customers throughout the nation, including those in Illinois. National had no physical presence in Illinois, but advertised through catalogs and flyers to its Illinois customers. Its sales to Illinois residents amounted to about $2,000,000 for the 15-month period in dispute. In fact, the dealings between National and its Illinois customers, except as to the extent of solicitation and the dollar amount of the sales, are remarkably similar to the dealings between Aldens and its Pennsylvania customers. The Illinois courts entered a money judgment against National for refusal in violation of an Illinois statute to collect from its customers the 3½% tax imposed on goods sold for use within the state. The Supreme Court reversed the decision of the Illinois court and held that the Illinois statute violated both the Commerce Clause and the Due Process Clause of the 14th Amendment. The Court noted that the due process and commerce clause claims were closely related. Then, using due process analysis, the Court found that the paucity of contacts between National and Illinois negated the presence of a "minimum benefit" upon National from Illinois upon which the requirement to collect the use tax must be based. The Court observed that requiring a mail order business to collect use taxes would expose that business to similar burdens imposed by thousands of political subdivisions throughout the nation.

National Bellas Hess, because it concerns state taxation of interstate business, is not controlling upon the issues

in the case *subjudice*.[2] Taxation is regarded as an exaction by the state for the general benefits of living under an organized government, and when falling upon interstate commerce, "can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." National Bellas Hess v. Department of Revenue, *supra*, at p. 756, of 386 U. S., at p. 1391 of 87 S. Ct., quoting Freeman v. Hewit, 329 U. S. 249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946). Thus, the question becomes whether the state has given anything for which it can ask a return. Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940). The Supreme Court in *National Bellas Hess* answered that question in the negative.

Plaintiff also relies on that line of cases which holds that state statutes requiring licensing of entities doing interstate business within the state are unconstitutional unless the activities performed within the state are unrelated to the interstate aspect of the business. Crutcher v. Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649 (1891); International Textbook Co. v. Pigg, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961). However, the state licensing statutes must also be considered as an exaction by the state for the privilege of doing

2. Aldens asserts that *National Bellas Hess* is not a tax case because it does not involve a statute imposing a tax. Rather, it attempted to impose upon National the obligation to collect from its customers the tax and to turn over those taxes to the state. However, the Court analyzed the case in the same due process terms as it does cases involving taxes on interstate commence. See Central R. R. v. Pa., 370 U. S. 607, 618, 82 S. Ct. 1297, 8 L. Ed. 2d 720 (1962) (Black, J., concurring). Other cases involving the obligation of out-of-state businesses to collect the use tax have been traditionally treated in the same manner as cases involving the imposition of a direct tax upon the business. See Developments in the Law—Federal Limitations on state taxation of interstate business, 75 Harv. L. Rev. 953, 994-1000 (1931).

business within the state. See Breard v. Alexandria, 341 U. S. 622, 638, 71 S. Ct. 920, 95 L. Ed. 1233 (1951). When that business is purely interstate in nature, a licensing requirement is unconstitutional under the commerce clause because the states are prohibited from imposing conditions upon the right to engage in interstate commerce.

The statute involved in the case at bar is distinguishable from taxing and licensing statutes in that it involves an exercise of the state's police power to protect local customers from overreaching and deception. The state has considerable power in this area even though interstate commerce is affected. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963). Plaintiff does not contest the power of the Commonwealth to regulate service charge rates for revolving credit accounts, or the reasonableness of the 15% ceiling. Indeed, Plaintiff has advised the Court that 41 states plus the District of Columbia regulate at various rates service charges in revolving credit accounts. We are not here dealing with an exaction for the privilege of doing business with Pennsylvania residents, but with a statute reasonably calculated to protect consumers residing in Pennsylvania from unfair credit practices. This is a crucial distinction. Thus, the state need not demonstrate a benefit conferred upon Aldens in exchange for the right to regulate its transactions with Pennsylvania residents.

The Plaintiff points out that every case upholding a statute seeking to protect the public's health, safety, morals, or welfare involves some local activity or physical presence of the regulated entity within the regulatory state. When the physical presence is often transitory. Thus, a state can regulate the highway speed of trucks engaged solely in interstate commerce, South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, 1938, or control the emission of smoke from ships

involved in interstate commerce while the ships are docked at the port of the regulating jurisdiction. Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960). The interest of the state in protecting its citizens is so strong that the state may even prohibit certain dangerous products from entering the state at all. Rasmussen v. Idaho, 181 U. S. 198, 21 S. Ct. 594, 45 L. Ed. 820 (1901); Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. Ed. 878 (1898). In these quarantine cases, local activity or physical presence within the state is obviously absent.

In my view, application of the Pennsylvania Goods and Services Installment Sales Act to Aldens does not depend upon Aldens' physical presence in Pennsylvania. Aldens' annual solicitation of over two million Pennsylvania residents and its sales to Pennsylvania residents in an amount of almost $15,000,000 per year indicates an exploitation of the Pennsylvania market and requires Aldens to conform with the Act which protects Pennsylvania consumers in those types of transactions in which Aldens engages. To hold otherwise would expose Pennsynvania consumers to the type of credit sales practices which the Pennsylvania legislature deemed unfair and prohibited in Pennsylvania. In Robertson v. People of State of California, 328 U. S. 440, 459-460, 66 S. Ct. 1160, 1170, 90 L. Ed. 1366 (1946), the Supreme Court, in upholding provisions of the California Insurance Code which prohibited the sale of insurance in California by unadmitted foreign insurance companies stated the following:

> "It is quite obvious . . . that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or losely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries."

Similarly, if Pennsylvania cannot regulate the finance charges of mail order businesses, then the ultimate result could be that all retailers would do business through the mails from a state whose service charge ceiling was the highest. I have concluded that the Act does not violate the commerce clause on the ground that it is regulation purely of interstate commerce.

There remains to be considered whether application of the Act to Aldens constitutes an undue burden upon interstate commerce. On this issue, Plaintiff again relies on *National Bellas Hess* which apparently held that the obligation of National to collect use taxes constituted an undue burden upon interstate commerce because of the danger that thousands of different taxing jurisdictions could impose a similar obligation upon National's business thus entangling that interstate business in a "virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" 386 U. S. at 760, 87 S. Ct. at 1393. (emphasis added). A simple answer to this position is that the Act in question has as its purpose the protection of consumers, and it does not impose a tax which can only be justified by a finding that the state has given something for which it can ask return. Unlike the *National Bellas Hess* situation, we are not here dealing with "unjustifiable

local entanglements" because pursuant to Pennsylvania's police power, the "entanglements" are justifiable. Furthermore, at most Aldens would be subject to regulation by 50 states, not the more than 2,300 jurisdictions which were the concern of the Court in National Bellas Hess. 386 U. S. at p. 759, n. 12, 87 S. Ct. at p. 1393. I would not find undue burden in the fact that Aldens will be forced to incur additional costs of preparing catalogs, advertising materials, credit agreements, etc. in the amount of $53,000.00 in light of the almost $15,000,000 gross annual sales to Pennsylvania consumers.[3] Nor do I consider it important that Aldens would incur expenses of $320,000 per year if it were required to comply with the varying statutes in those states which presently regulate revolving charge agreements. Not only is the necessity of this expense speculative, but it represents only a very small percentage of Aldens' gross sales. The cost which Aldens will or might incur as a result of compliance with the Act could be of relevance on the issue of undue burden if there were other factors constituting burden. Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 528, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959). However, Aldens has not shown such other factors. The application of the Act would not constitute an undue burden upon interstate commerce. Therefore, I have concluded that the national interest in the free flow of interstate commerce does not outweigh the interest of Pennsylvania in protecting its consumers from unreasonable service charge rates on installment credit accounts.

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3. I do not consider relevant the $750,000 loss of service charge revenue from Pennsylvania customers which Aldens would incur as a result of the 15% maximum service charge rate. This is the amount which the Pennsylvania legislature considered to be in excess of a fair rate.

II. *Due Process.*

Plaintiff next contends that the application of the Act to Aldens is a violation of the due process clause of the 14th Amendment in that it is an attempt to regulate extraterritorial activity of Aldens and because there are no minimum contacts with Pennsylvania. Plaintiff again relies upon *National Bellas Hess* but, as noted above, the due process analysis in that case is not necessarily applicable to the situation in the case at bar. "It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process." Travelers Health Association v. Virginia, 339 U. S. 643, 653, 70 S. Ct. 927, 932, 94 L. Ed. 1154 (1950) (Douglas, J., concurring). This proposition is best demonstrated by the fact that in *National Bellas Hess* and in the case at bar, there are sufficient contacts between National and Aldens and the two states involved to permit the exercise of in personam jurisdiction over National and Aldens. See McGee v. International Life Insurance Company, 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957). The "minimum contacts" necessary to satisfy due process as to the applicability of a state regulatory statute to an out-of-state entity need not be as extensive as those required in a tax case. In Travelers Health Association v. Virginia, *supra,* the Supreme Court unheld both service of process and the state's Blue Sky Law as applied to an out-of-state mail order insurance company. The only physical presence of the insurance company was the unpaid activities of those already members who were encouraged to recommend other possible customers to the insurance company. Although this informal type of solicitation is not present in the case at bar, Aldens' extensive solicitation by mail and exploitation of the Pennsylvania market present in this case constitute a minimum connection between

Aldens and Pennsylvania sufficient to justify application of the Goods and Services Installment Sales Act against Aldens. This analysis was employed by the three dissenters in *National Bellas Hess.* Despite the fact that the majority rejected this test of "minimum contacts" in the tax situation, it is applicable in my view to Pennsylvania's valid exercise of its police power. I concede, therefore, that application of Goods and Services Installment Sales Act to Aldens does not deprive Aldens of the due process of law.

III. *Right to Use the Mail.*

Finally, Aldens contends that the act infringes upon Aldens' constitutional right to use the United States mails because all of its contacts with Pennsylvania residents are through the U. S. Mails. However, the Act in no way attempts to regulate what Aldens may send through the mail. It only provides that Aldens cannot charge its Pennsylvania customers more than 15% annually on an installment account. Only when state control involves a "direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions" will state regulation be deemed unconstitutional. Railway Mail Association v. Corsi, 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072 (1945). Plaintiff's postal clause argument is without merit.

In conclusion, then, I have determined that the Goods and Services Installment Sales Act is constitutional as applied to Aldens' transactions with Pennsylvania residents, and therefore Aldens' motion for summary judgment and request for declaratory judgment must be denied.

IV. *Defendant's Counterclaim.*

It must next be determined whether Defendant is entitled to summary judgment on his counterclaim or whether

Plaintiff's motion for judgment on the pleadings as to Defendant's counterclaim should be granted. As noted above, the counterclaim seeks a declaratory judgment that the Act is constitutional as applied to Aldens and a request for an injunction against Aldens' future noncompliance with the Act. There are several problems in Defendant Packel's assertion of his counterclaim in this case. First, F. R. Civ. P. 13 refers to counterclaims against an "opposing party." The counterclaim seeking a declaration that the Act is constitutional and for an injunction against Aldens' further non-compliance with the Act belongs to the Commonwealth, not to the Attorney General. Defendant has cited no case which would confer upon him the power to bring an action in his own name which seeks to enforce a state statute. Thus, under F. R. Civ. P. 13, it would appear that Aldens and Defendant Packel are not opposing parties for the purposes of this counterclaim. A similar analysis leads the Court to conclude that Defendant Packel is not the real party in interest in regards to the counterclaim as required by F. R. Civ. P. 17.

Putting aside these problems of whether Defendant Packel is the proper party to assert the counterclaim, there are additional reasons why the counterclaim is improper in this case. Defendant's request for a declaration that the Act is constitutional as applied to Aldens brings into question issues which have already been presented and decided by this opinion in favor of Defendant. The Court's decision in this case that the Act is constitutional adequately protects the Defendant and the Commonwealth, and therefore, Defendant's request for declaratory judgment is moot See Cover v. Schwartz, 133 F. 2d 541 (2d Cir. 1943), cert. denied, 319 U. S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703; Larson v. General Motors Corp., 134 F. 2d 450 (2d Cir. 1943), cert. denied, 319 U. S. 762, 63 S. Ct. 1318, 87 L. Ed.

1713; see generally, Wright and Miller, Federal Practice and Procedure, § 1406.

In his counterclaim, Defendant also seeks an injunction against Aldens. In my view, the Court cannot grant this injunctive relief to the Defendant because the Defendant could not obtain that type of relief in the state court system. Nowhere in the Act is the availability of injunctive relief mentioned.[4] The penalties for a violation of the Act are listed in Article XII of the Act and include conviction for a misdemeanor, 69 P. S. § 2201, and a private right of action on the part of the buyer for recovery of any time price differential or service charge, 69 P. S. § 2202, and in some cases, treble damages. 69 P. S. § 2204. This situation is clearly controlled by the case of Commonwealth v. Glen Alden Corp., 418 Pa. 57, 210 A. 2d 256 (1965), in which the Supreme Court of Pennsylvania held that injunctive relief would not lie in a controversy where the legislature had provided a statutory procedure for its resolution. Defendant has directed the Court's attention to no case which has held that injunctive relief would be available under these circumstances.

The Court has concluded that Defendant's counterclaim is improper, and that therefore, Defendant's motion for summary judgment on that counterclaim must be denied. Plaintiff's motion for a judgment on the pleadings as to the counterclaim will be granted.

An order in conformance with the Opinion will be entered.

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4. There is presently before the Pennsylvania legislature a bill which would modify the Act to include, *inter alia*, a provision enabling the Attorney General to enforce the Act by seeking an injunction. Senate Bill #1473, Session of 1974, § 1203. This fact lends support to Plaintiff's position that if injunctive relief were available under the Act. It would have been specifically provided.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1971 and 74-1972

ALDENS, INC.,
Appellant in No. 74-1971

v.

ISRAEL PACKEL, Attorney General for the Commonwealth of Pennsylvania, Individually and in His Official Capacity,
Appellant in No. 74-1972
(D. C. Civil Action No. 73-674)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued June 2, 1975
Before, SEITZ, *Chief Judge*, ALDISERT and
GIBBONS, *Circuit Judges*

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OPINION OF THE COURT

(Filed August 27, 1975)

GIBBONS, *Circuit Judge.*

We herein consider cross-appeals from a final order of the district court granting the defendant's motion for summary judgment on plaintiff's complaint, and also granting plaintiff's motion for judgment on the pleadings on defendant's counterclaim. *Aldens, Inc. v. Packel*, 379 F. Supp. 521 (M. D. Pa. 1974). The plaintiff Aldens, Inc. (Aldens) originally sought both injunctive and declaratory relief against the enforcement of the Pennsylvania Goods and Services Installment Sales Act, 69 P. S. §§ 1101-2303 (Supp. 1975). In an amended complaint Aldens abandoned its prayer for injunctive relief and the case proceeded before a single district judge. Thus, this appeal properly comes to this court. To the amended complaint the defendant Israel Packel, the Attorney General of Pennsylvania (the Attorney General), filed an answer, and a counterclaim seeking injunctive relief enforcing the Act against the plaintiff upon a declaration of its constitutionality. The district court held that the statute was constitutional but refused to grant injunctive relief on the theory that the Attorney General could not obtain that relief in the courts of the Commonwealth. Thus it dismissed the counterclaim. While there were no disputed facts presented since a stipulation had been agreed to, the Attorney General did challenge the relevancy of certain of the submissions. Since the legal issues raised by Aldens' appeal and those raised by the Attorney General are unrelated we treat the appeals separately.

I. ALDENS' APPEAL.

Aldens is an Illinois corporation operating a mail order business. By catalogs and flyers mailed from its headquarters in Chicago, it solicits orders in fifty states, including Pennsylvania. It has no tangible property in Pennsylvania. It employs no agents, salesmen, canvassers or solicitors in Pennsylvania. It has no Pennsylvania telephone listing and except for its mail order catalogs and flyers it does not advertise by use of any Pennsylvania media. It does not use any Pennsylvania credit verification sources to check on the credit of its Pennsylvania customers, although a Chicago credit reporting agency to which it resorts does inquire of credit bureaus in Pennsylvania for such information. All merchandise orders are filled from outside Pennsylvania and shipped F. O. B. from a point of origin in another state. The customers pay the shipping, handling and transportation costs. Aldens is neither required to collect nor to remit Pennsylvania use taxes nor to qualify nor to register to do business in Pennsylvania. It accepts or rejects all orders for merchandise in Chicago. Only the Chicago office grants credit, and all credit application forms and credit agreements are mailed by Pennsylvania residents seeking credit to Chicago.

Aldens' credit agreement, which is used nationwide, provides for a monthly service charge of 1.75% on balances of $350.00 or less, which is an annual percentage rate of 21%, and for a monthly service charge of 1% (12% annually) on that portion of the balance which exceeds $350.00. Payments are received in Chicago and credited to customers' accounts there. Aldens' credit agreements provide for the retention of a purchase money security interest in merchandise sold on credit, but it does not file any security interest document, does not enforce any security interests, and has a security interest in merchandise unpaid for only to the extent provided by law. The Aldens agreement complies with the Federal Truth in Lending Act, 15 U. S. C. §§ 1601-65 and applicable truth in lending regulations of the Board of Governors of the Federal Reserve System (Regulation Z), 12 C. F. R. §§ 226.1-.1002. The agreement also complies with applicable Illinois law. It does not comply with Pennsylvania law.

Aldens' annual sales to Pennsylvania customers approximate $14,900,000, which represents about 7.6% of its annual sales. Approximately 73% of the $14,900,000 represents credit sales to some 90,000 Pennsylvania credit customers whose average balance is about $169.00. Were Aldens to comply with the Pennsylvania Goods and Services Installment Sales Act it would incur additional annual costs and expenses and would sustain annual revenue losses attributable to such compliance as follows:

"a. Approximate additional cost of preparing catalogs, advertising materials, and credit agreements containing Pennsylvania credit terms; special computer processing and handling costs for Pennsylvania customers in setting up accounts and producing monthly billing statements	$ 53,000

b. Approximate loss of finance and service charge revenue from Pennsylvania customers	$750,000
Total	$803,000"

(Jt. App. at 33a).

The $53,000 in additional cost would be incurred in part because the Pennsylvania Act not only regulates credit rates, but also requires specific disclosures and the use of specific forms of contracts and billing statements. Were Aldens to comply similarly with the provisions of varying statutes of other states which regulate revolving charge agreements in manners different from the Federal Truth in Lending Act and Illinois law, it would incur comparable additional expenses and revenue losses.

Pennsylvania contends that its Goods and Services Installment Sales Act applies to Aldens' credit sales to Pennsylvania residents because 69 P. S. § 1103 provides:

> "For the purposes of this act a retail installment contract, contract, retail installment account, installment account, or revolving account is made in Pennsylvania and, therefore, subject to the provisions of this act if either the seller offers or agrees in Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania buyer accepts or makes the offer in Pennsylvania to buy, regardless of the situs of the contract as specified therein.
>
> Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania.
>
> Any solicitation or communication to buy, verbal or written, originating within the Commonwealth of

> Pennsylvania, from a resident buyer of Pennsylvania, but forwarded to and received by a retail seller outside the Commonwealth of Pennsylvania shall be construed as an acceptance or offer to buy in Pennsylvania."

Aldens contends that Pennsylvania cannot, consistent with the federal constitution, apply its consumer credit law to the transactions in question, which, it says, are Illinois contracts performed entirely outside Pennsylvania and in interstate commerce. Aldens contends, in other words, that § 1103 is a Pennsylvania choice of law rule setting forth a choice of law which that state cannot constitutionally make.

There are well recognized federal constitutional limitations upon state choice of law rules. As a framework for analysis of Aldens' challenge to § 1103 a review of those limitations is appropriate.

A. *The Due Process Limitation.*

The due process clause of the fourteenth amendment limits the power of a state to export its sovereign decisional authority, including its authority to make choices of law, to transactions with which it has an insufficient minimum interest. The contours of this limitation have been defined for the most part in cases involving attempts at extraterritorial service of process,[1] but it has been applied in contexts outside the extraterritorial service of process area

1. *See, e.g.*, McGee v. International Life Insur. Co., 355 U. S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U. S. 643 (1950); International Shoe Co. v. Washington, 326 U. S. 310 (1945); Henry L. Doherty & Co. v. Goodman, 294 U. S. 623 (1935); Hess v. Pawloski, 274 U. S. 352 (1927); Pennoyer v. Neff, 95 U. S. (5 Otto) 714 (1877).

as well.[2] The "long arm" cases are the more recent, and in these the Supreme Court made an interest analysis which focused upon the interest of the state which would or would not suffice to justify *any* exercise of its sovereignty in connection with the transaction in dispute.[3] Since *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957) it has been clear that the due process clause defines a rather low threshold of state interest sufficient to justify exercise of the state's sovereign decisional authority with respect to a given transaction. Aldens urges that Pennsylvania's interest in the Illinois contracts with Pennsylvania residents is insufficient to meet the due process threshold bar. We disagree. We think it clear beyond question that Pennsylvania has a substantial interest in the rates paid by its residents to foreign companies for the use of money and in the contracts setting those rates. The stipulated facts establish that Aldens would obtain $750,000 a year more in interest than a Pennsylvania seller could lawfully obtain on identical transactions if it did not comply with the Pennsylvania Act. Aldens suggests that the result of applying Pennsylvania law to its Illinois-centered activities may not be that Pennsylvania residents will pay less interest, but that those residents, in order to purchase the merchadise which Aldens sells, will have to borrow from small loan companies in order to buy for cash. (See Reply Brief for Appellant at 2 n. 2.) The small loan company rates are said to be substantially higher than the

2. *See, e.g.*, Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U. S. 143 (1934); New York Life Ins. Co. v. Dodge, 246 U. S. 357 (1918); Allgeyer v. Louisiana, 165 U. S. 578 (1897); all invalidating on due process grounds the application of forum law to contracts made elsewhere by forum residents. *But see* Travelers Health Ass'n v. Virginia, 339 U. S. 642, 652 (1950) (Douglas, J., concurring); Hoopeston Co. v. Cullen, 318 U. S. 313 (1943).

3. *But see* Hanson v. Denckla, 357 U. S. 235, 253 (1958).

12% and 21% rates charged by Aldens. See 7 P. S. § 6152. But this argument goes to the wisdom or social utility of Pennsylvania's choice of law, not to its constitutional power to make that choice. Aldens also conjures up extreme possible applications of the statute. It posits, for example, a case of a Philadelphia resident who mails an unsolicited order to a merchant in Atlantic City, New Jersey, for delivery to the Philadelphian's summer home in Ocean City, Maryland. Brief for Appellant at 35. The stipulation of facts does not establish that among Aldens' 90,000 Pennsylvania customers there is one fitting that case, and we express no opinion as to whether in the case of the Atlantic City merchant the due process threshold would be met. It suffices to hold that Pennsylvania's interest in the rates which its residents pay for the use of money for purchase of goods delivered into Pennsylvania is substantial enough to satisfy any due process objection to its attempt at regulating the subject matter. To the extent that any of the cases referred to in footnote 2, *supra*, may suggest otherwise they must be deemed to have been limited by the more recent interest analysis approach of cases such as *McGee v. International Life Insurance Co., supra; Travelers Health Ass'n v. Virginia*, 339 U. S. 643 (1950), and *Hoopeston Co. v. Cullen*, 318 U. S. 313 (1943).

Aldens chief reliance in its due process argument is on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U. S. 753 (1967) which held that a provision of the Illinois use tax act which imposed a duty on an out-of-state mail order seller to collect Illinois use taxes was unconstitutional.[4] The Court treated the case as a tax case, and said:

> "And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444." 386 U. S. at 756.

4. Aldens relies on *National Bellas Hess* in support of its commerce clause argument as well. See text at pp. 23-24 *infra*.

Tax cases of necessity come in for special due process scrutiny. No state interest rates so high in the state scale of values as the state sovereign's fisc. At the same time no extraterritorial manifestation of sovereignty, except possibly arrest, is quite so offensive to common notions of its territorial limits. Thus, extraterritorial impositions of tax collection obligations have been upheld only when it can be said that a benefit has been conferred on the tax collector by virtue of the state's sovereignty, and the tax is related to that benefit. Since the Court found no way in which Illinois as a sovereign either conferred any benefit on the mail order seller or facilitated the transaction, it declined to permit extraterritorial imposition of a collection duty. The instant case presents an entirely different issue. Pennsylvania is not attempting to export any duty toward its treasury. Aldens is obtaining money from Pennsylvania residents in whom Pennsylvania has a local sovereign protective interest. There is simply no reason why in weighing the significance of that interest for due process purposes we should impose on Pennsylvania the higher burden it would have to meet in a tax collection case. Thus we reject Aldens' due process challenge to § 1103.

B. *The Full Faith and Credit Limitation.*

The full faith and credit clause contains another limitation on the authority of one state to disregard the public acts of a sister state. Its limitation applies, even to a state with a sufficient interest in the transaction to satisfy the due process threshold, when, upon an analysis of com-

peting factors, a sister state has a greater interest in regulating the transaction.[5] To a certain extent the considerations relevant under the due process clause and under the full faith and credit clause overlap. This is because those considerations on which Pennsylvania relies to overcome the due process limitation are placed on the scale when balancing its interest in applying its public policy against Illinois' interest. We must, therefore, first identify the competing interests and then attribute to them appropriate values. Since we have said already that Pennsylvania has a substantial interest in the rate paid by its residents for the use of money, we will turn to the competing interest of Illinois in the transaction.

Illinois affords to persons or corporations doing business there a law of contracts which sanctions the enforcement of contractual undertakings. But, granting that the contracts in issue here are substantially Illinois contracts, it does not follow that Illinois has an interest in every consequence that flows from them. Although in enacting §1103 Pennsylvania speaks in terms of redefining the place of contracting, it does so only for the purpose of the Pennsylvania Goods and Services Installment Sales Act. Except to the extent that it requires compliance with that Act it gives full faith and credit to the Illinois law of contracts. If there is any conflict with an Illinois public act, it is only in connection with the regulation of the time-price differential charges by Illinois sellers to Pennsylvania buyers Illinois also limits interest rates in consumer credit transactions, but it does so only by prohibiting exactions in excess of certain statutory maximums; the governing statute allows any rate to be taken in connection with an

5. First National Bank v. United Air Lines, Inc., 342 U. S. 396 (1952); Hughes v. Fetter, 341 U. S. 609 (1951); Order of Commercial Travelers of America v. Wolfe, 331 U. S. 586 (1947); John Hancock Mutual Life Insurance Co. v. Yates, 299 U. S. 178 (1936).

Illinois contract not in excess of the rate allowed by Illinois law.[6] Illinois has manifested no interest in requiring that firms headquartered there obtain the maximum interest allowed under its law. If Illinois actually specified the terms on which Illinois sellers could contract, as in *Order of United Commercial Travelers v. Wolfe, supra,* we would be faced with a full faith and credit issue requiring a delicate balancing of competing interests. In this case, however, there is no conflict between Illinois policy and Pennsylvania policy, and no public act of Illinois to which Pennsylvania has not but should give full faith and credit. Thus, the full faith and credit clause does not prevent application of Pennsylvania law.

C. *The Commerce Clause Limitation.*

As we have seen the due process clause requires the identification of *any* Pennsylvania interest sufficient to justify the exercise of Pennsylvania sovereignty with respect to a given private transaction. The full faith and credit clause, on the other hand, requires a balancing of the possible competing interests of separate state sovereignties. Under the commerce clause our attention shifts to conflicts between local and national interests.

Classifying the Supreme Court's commerce clause adjudications for the purpose of analytical application may

6. "When any written contract, wherever payable, shall be made in this state, or between citizens or corporations of this state, or a citizen or a corporation of this state and a citizen or corporation of any other state, territory or country (or shall be secured by mortgage or trust deed on lands in this state), such contract may bear any rate of interest allowed by law to be taken or contracted for by persons or corporations in this state, or allowed by law on any contract for money due or owing in this state; provided, however, that such rate of interest shall not exceed 8% per annum, except as expressly authorized by this Act or other laws of this State. . . ." 74 Ill. Rev. S. §8 (Supp. 1975).

seem to many an exercise in futility. In this area of constitutional law, perhaps more than in any other, the political philosophy of the Court's majority at a given moment has influenced not only the outcome, but the reasoning of the decision.[7] Thus an opinion from one era may reflect an evaluation of the relative weight to be given to local versus national interests that a later court has rendered obsolete. Complicating the picture further, the Court's majority has not always been consistent in its perception of the extent to which Congress rather than it should determine where the national interest lies. Nevertheless, some analytical framework must be attempted or we will be reduced to the even more futile exercise of color-matching the stipulated facts in this case to the commerce clause cases which appear to glow with the most nearly similar hue. We suggest, then, that the commerce clause limits the power of a state to impose its choice of law on any transaction that is within the broad ambit of congressional power to regulate interstate commerce, and

(1) is one in which Congress has made its own choice of law,[8] or

7. *See generally* F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (1937).

8. As Chief Justice Marshall put it:

"If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying, that a state law coming to conflict with such act would be void. . . ."

Willson v. Black-Bird Creek Marsh Co., 27 U. S. (2 Pet.) 252 (1829). Since 1829 the verbal formulation has changed from time to time. *See* Cooley v. The Board of Wardens of the Port of Philadelphia, 53 U. S. (12 How.) 299 (1852). Today, the word preemption is used sometimes without reference to the commerce clause source of the power to preempt. Burbank v. Lockheed Air Terminal, Inc., 411 U. S. 624 (1973). *See, e.g.,*

(2) is one in which Congress has made no specific choice of law, but

(a) despite this inaction the nature of the subject matter requires a uniform national rule,[9] or

(b) the choice of law made by the state discriminates against persons engaged in interstate commerce in favor of local interests,[10] or

(c) a non-discriminatory state choice of law, in an area where national uniformity may not be essential, imposes a burden on interstate commerce in excess of any value attaching to

8. (Cont'd.)

Campbell v. Hussey, 368 U. S. 927 (1961); Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947); Kelly v. Washington *ex rel.* Foss Co., 302 U. S. 1 (1937); *cf.* Pennsylvania v. Nelson 350 U. S. 497 (1956). The split decision in Burbank v. Lockheed Air Terminal, Inc., *supra,* demonstrates that the Court's willingness to find a sufficiently express intention to exclude state choice of law in a given congressional enactment, is a close issue. But, Marshall's underlying constant is not disputed. When Congress has regulated commerce its word is law and its law is supreme

9. In Justice Curtis' words:

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. . . ."

Cooley v. Board of Workers of the Port of Philadelphia, 53 U. S. (12 How.) 299, 319 (1852). An application of Justice Curtis' formula to strike down a local law appears in Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U. S. 761 (1945). *Compare* Southern Pacific Co., *supra, with* Brotherhood Locomotive Firemen v. Chicago, Rock Isl. & Pac. R. R. Co., 393 U. S. 129 (1968) and South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U. S. 177 (1938) in which the Court found no requirement for national uniformity.

10. *See, e.g.,* Dean Milk Co. v. Madison, 340 U. S. 349 (1951); H. P. Hood & Sons, Inc. v. Du Mond, 336 U. S. 525 (1949); Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935); Minnesota v. Barber, 136 U. S. 313 (1890).

> the state's interest in imposing its regulation.[11]

If the state choice of law does not run afoul of any of the foregoing categories it is valid under the commerce clause whether it is called a "police" regulation or a "tax" case, a regulation "of commerce," or if it goes by any other name. The label is not, or should not be, significant. What is, or should be, significant is the identification of factors which will place the case in one or another of the analytical categories, or in none.

In this case we can eliminate category (1), for although Congress has acted comprehensively in the field of retail installment credit in the Federal Truth in Lending Act, Act of May 29, 1968, Pub. L. No. 90-321, Title I, § 102 *et seq.*, 82 Stat. 146, 15 U. S. C. §§ 1601-65, it has not seen fit to regulate interest rates in that field. It has, moreover, expressly deferred to state authority. *See* 15 U. S. C. § 1610(b):

> "This subchapter does not otherwise annul, alter, or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply."

This express congressional recognition of the appropriateness of a state law role with respect to interest rates in the

11. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U. S. 137 (1970); (tenuous state interest); Bib v. Navajo Freight Lines, Inc., 359 U. S. 520 (1959) (multiple burdens from conflicting state laws outweigh state interest).

field of consumer credit serves to eliminate category 2(a) as well. It might be argued that § 1610(b) may be construed as an express adoption of state law as the appropriate federal standard for measuring interest rates in consumer credit transaction.[12] But even if § 1610(b) is not so construed, at a minimum it is a congressional recognition that the maximum level of interest rates in consumer credit transactions is not a subject matter requiring a uniform national rule. In face if this express congressional recognition that national uniformity is not required it would not, we suppose, be open to the Court to hold otherwise.[13]

Aldens urges that the Pennsylvania statute falls within category 2(b) in that it discriminates against interstate commerce. The full flavor of the argument is best captured by a quotation:

> "The Pennsylvania Act discriminates against interstate commerce in the sense that it benefits Pennsylvania companies making sales in Pennsylvania to non-Pennsylvania residents by leaving those in-state sales totally unregulated and burdens non-Pennsylvania companies making sales outside Pennsylvania to Pennsylvania residents by regulating the terms and conditions of those out-of-state sales. That is, the Pennsylvania Act applies to out-of-state companies doing business across Pennsylvania's borders, but not to Pennsylvania companies doing business across those same borders. Equally important, the Act dis-

12. *See, e.g.*, Richards v. United States, 369 U. S. 1 (1962); United States v. Gerlach Live Stock Co., 339 U. S. 725 (1950); Prudential Ins. Co. v. Benjamin, 328 U. S. 408 (1946); Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311 (1917).

13. The congressional intention to defer to state regulation of consumer credit rates as far more explicit in § 1610(b) of the Truth in Lending Act than was the congressional intent to exclude such regulation in Burbank v. Lockheed Air Terminal, Inc., 411 U. S. 624 (1973).

criminates in favor of Pennsylvania residents and against out-of-state residents when both make purchases from a Pennsylvania mail order house. The Pennsylvanian must be given notice of the terms of his contract in the form prescribed by the Act, will be subject only to the service charges permitted in the Act, and may sue for treble damages or ask the Commonwealth to prosecute the merchant who does not conform with the Act. On the other hand, a non-Pennsylvania mailing an order identical to that of the Pennsylvania resident need be given no notice, may be charged any service charge the merchant sees fit to make and can neither recover damages or realistically hope that the merchant will be prosecuted for his actions." (Brief for Appellant at 27-28).

This argument is extremely fanciful. Pennsylvania makes no effort to regulate the time-price differential charged by anyone to a resident of another state. It explicitly negates any such effort by exempting transactions by Pennsylvania sellers with residents of other states.[14] Thus Pennsylvanians and Illini stand in exactly the same position in selling to Delawareans. It also places Pennsylvanians and Illini exactly on a par in selling to Pennsylvanians. No local interest is given an advantage within or without Pennsylvania. If Aldens wants to sell to a Pennsylvanian it can only do so on the same terms as a Pennsylvania mail order seller, who is engaged in interstate commerce. There is no discrimination.

Finally Aldens urges that the Pennsylvania act falls within category 2(c) by placing a direct burden on interstate commerce which cannot be justified by any interest of the Commonwealth. To put this argument in perspective we refer back to the discussion of the discrimination

14. 69 P. S. § 1103 purports only to apply to residents of Pennsylvania.

contention directly above. A mail order house located in Philadelphia, buying merchandise in interstate commerce, for resale in Pennsylvania, is in any realistic economic sense, engaged in interstate commerce just as much as is Aldens. Pennsylvania's regulation of the time-price differential in mail order sales by the Philadelphia mail order house, therefore, imposes on interstate commerce the same burden as in the case of sales by Aldens. Thus the decisive issue with respect to category 2(c) is not whether § 1103 is valid as applied to Aldens, but rather whether Pennsylvania can regulate the time-price differential on any consumer credit transaction in the stream of interstate commerce. The burden on interstate commerce does not depend upon the happenstance of respective locations of buyer and seller. The fundamental issue is whether the national interest in the free movement of money, credit, goods and services outweighs the valid local interest in restricting maximum interest rates on consumer "loans" and setting uniform contract terms for such transactions. Before the emergence of a national currency and a national monetary policy, and especially before the emergence of national concern over consumer protection in interstate commerce, the issue would not have been seriously debated. But even in the period since these developments, no case that we have been referred to has even so much as hinted that usury laws and related contract laws are not appropriate matters for local regulation. This despite the facts that such laws do burden interstate commerce, and that the burden is increased by lack of uniformity.[15] Considering, however, the historical recogni-

15. The extent of disparity in state treatment is described in Aldens' brief:

> "Of the 47 jurisdictions which regulate finance charges on revolving credit accounts, 42 regulate only transactions entered into within the regulating state in terms of traditional contract

tion that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws, any judgment that the present proliferation of regulations of

15. (Cont'd.)
law. The statutes in a number of states affirmatively restrict their application to in-state transactions: Alaska Stat. § 45.10.220(8); Calif. Civ. Code, § 1802-7; Colo. Rev. Stat., § 73-1-201; Conn. Rev. Stat. § 42-83(e), Laws of 1972, P. A. No. 40; Del. Code Ann., Tit. 6, § 4301; D. C. Code, § 28-3701(3); Ida. Code § 27-31-201; Ind. Stat. Ann. § 24-4.5-1-201; Kan. Stat. Ann., § 16a-1-201 La. Rev. Stat., § 9:3511; Mo. Rev. Stat. § 408.250(12); Nev. Rev. Stat., § 97.095; N. Y. Pers. Prop. Law, Ch. 41, Art. 10, § 401.8; Okla. Stat. Ann., Tit. 14A, § 1-201; P. R. Laws Ann., Tit. 10, § 7131.6; S. C. Consumer Protection Code, Laws of 1974, H. B. 2356, § 1.201; Utah Code Ann. § 70B-1-201; Wash. Rev. Code § 63.14-010(7). Many other jurisdictions have no specific provision concerning the application of their regulations, but make them applicable to in-state transactions by the normal common law principles: Code of Ala., Recompiled, Tit. 5, §§ 316-41; Ariz. Rev. Stat. §§ 44-601-06; Fla. Stat. §§ 520.30-42; Ga. Code Ann. §§ 96-901-13; Ill. Rev. Stat., Ch. 121 ½ §§ 501-33; Me. Rev. Stat. Ann., Tit. 9, §§ 3981-92; Md. Ann. Code, Art. 83, §§ 153A-I; Mich. Comp. Laws, §§ 445.851- ; Minn. Stat. §§ 334.16-18; Miss. Code, § 75-17-1; Mont. Rev. Codes, §§ 74-601-12; Nebr. Rev. Stat., §§ 45-204-08; N. J. Rev. Stat., §§ 17:16C-1-61; N. M. Stat. Ann., §§ 50-16-1-15; N. C. Gen. Stat., §§ 25A-1-45; N. D. Cent. Code, §§ 51-14-01-05; Ohio Rev. Code, §§ 1317.01-99; R. I. Gen. Laws, §§ 6-27-1-8; S. D. Laws of 1974, S. B. 10, §§ 1-4; Tenn. Code, §§ 47-11-101-10; Tex. Rev. Civ. Stat., Arts. 6.01-.09; Vt. Stat. Ann., Tit. 9, §§ 2401-10; Va. Code §§ 6.1-361-63; W. Va. Code, §§ 46A-1-101-8-102. Colorado, Idaho, Indiana, Kansas, Oklahoma, South Carolina and Utah, although recognizing the legality of out-of-state credit agreements with finance charges in excess of those permitted under their own laws, deny enforcement in their courts of so much of the finance charges as exceed the locally permitted rates.

By contrast, three states have enacted statutes which apply not only to the traditional agreement made within the state, but—at least under certain circumstances—also to revolving credit charge sales made to buyer residing in the state even though under traditional legal concepts the contract would be held to have been made in another state: Iowa Code, § 1.201; Wisc. Stat., § 421.201; Wyo. Stat., § 40-1-201. Effective January 1, 1975 a fourth state will join this group. Me. Rev. Stat. Ann., Tit. 9A, § 1.201. These states seek to give their residents protection even in interstate transactions, but do not at the

consumer credit transactions has burdened commerce unduly must be made by Congress. Here the legislative judgment made in § 1016(b) of the Truth in Lending Act once more becomes significant. Congress has deferred to the states on the matter of maximum interest rates in consumer credit transactions. Since it has done so we decline to hold that the burden imposed by Pennsylvania on Aldens' interstate commerce by virtue of § 1103 is so great that it outweighs the Commonwealth's interest in regulating the rates which its resident consumers may pay for the temporary use of money or the terms on which they may contract for such use.

Specific reference must be made at this point to two cases which Aldens contends are most nearly color matches of the stipulated facts; *National Bellas Hess, supra,* and *Allenberg Cotton Co. v. Pittman,* 419 U. S. 20 (1974). The first we have already discussed in connection with Aldens' due process contention. The Court in *National Bellas Hess*

15. (Cont'd.)
same time try to free in-state companies from following the state regulations when they deal with out-of-state buyers.

Only Massachusetts (Mass. Gen. Laws, Ch. 255D, § 1) may conceivably have sought the same ends as the Pennsylvania Act, although the Massachusetts statute is plainly different on its face from Pennsylvania's. Indeed, the Massachusetts statute, based as it is on the place where the buyer signs the credit agreement, has a totally unpredictable scope given today's mobile population.

Those states which do not regulate service charges but do regulate disclosure or other conditions of sales or both also seek to apply their statutes only to transactions consummated in the regulating state either by explicit statutory provision, Ore. Rev. Stat., § 83.010(7), or by the application of common law principles, Haw. Rev. Stat., §§ 476-1 - 476-38 (see 476-29); Kent. Rev. Stat. §§ 371.210-.330; N. H. Rev. Stat. Ann., §§ 391-B:1-:8.

Arkansas has made no choice concerning the territorial application of its regulations of retail installment sales since it, alone among the states, has not yet adopted any legislation concerning terms, conditions or disclosure." (Brief for Appellant at 28-29 n. 10.)

held that the Illinois attempt to impose the duty to collect Illinois use taxes on an out-of-state mail order house was invalid under the commerce clause for the same reason that it was invalid under the due process clause—the business or transaction on which the obligation was sought to be imposed was not facilitated by Illinois' sovereignty. The case *sub judice* is distinguishable under the commerce clause for the same reasons set forth above in the discussion of the due process clause.[16] Pennsylvania is not attempting to export obligations to its treasury, or to export its public policy on consumer credit interest rates. It merely seeks to afford uniform protection to all Pennsylvania residents with respect to such rates.

Allenberg Cotton, supra, involved a provision of Mississippi law which prohibited a foreign corporation transacting business in that state without a certificate of authority from bringing suit in a Mississippi court. The suit in question was by a Tennessee cotton merchant to enforce a forward contract in which a Mississippi farmer had contracted with the merchant to deliver his season cotton crop. Once he obtained the forward contract the cotton merchant made resale contracts in interstate commerce, and those resale contracts were reflected in the prices on a national commodities exchange. The cotton merchant had no office or employees in Mississippi on a regular basis, and accepted the farmer's contract, solicited

16. Tax cases are frequently classified separately in commerce clause commentary. In the scheme of classification which we have set forth we would probably place them in category 2(c) recognizing that a balance is being struck, either judicially, *see, e.g.,* Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 (1959), or legislatively, *see* 15 U. S. C. § 381, between the interests of the several states in deriving revenue from activities in interstate commerce and the burdens imposed by pursuit of that interest. But since this is not a tax case we need not here decide whether the more conventional separate classification of such cases is appropriate.

by an independent broker, who had no authority to bind him. Recognizing that the purpose of the Mississippi statute was to encourage local qualification by foreign corporations, the Court held that this state interest was an insufficient justification for the very substantial burden which denial of judicial enforcement of the forward contract placed upon interstate commerce in cotton. It therefore reversed the dismissal of the complaint by the Mississippi state courts.

Those state statutes closing the courts to foreign corporations which fail to qualify locally are paradigms of our category 2(c). The state has an interest in requiring local qualification, and if there are sufficient local contacts by the foreign corporation the state may enforce that interest by imposing the severe sanction of closing local courts.[17] But where, as in *Allenberg Cotton, supra,* local presence has virtually no intrastate aspect, the burden on interstate commerce from the imposition of the sanction outweighs the state's interest. Striking that balance is always a matter of federal law. But it is federal law on which the Court has received no instruction from Congress, and in which the Court proceeds on a case-by-case basis. The most significant difference between cases involving state statutes closing the door to foreign corporations and this case is that here Congress has expressly deferred to the states on the matter of consumer credit interest rates. Congress having used the legislative scales, there is no need and there may be no room for the kind of judicial weighing which produced one result in *Eli Lilly & Co. v. Sav-On-Drugs, Inc.,* 366 U. S. 276 (1961) and another in *Allenberg Cotton, supra.* Even if Congress had not done so, *Allenberg Cotton* is in any event distinguishable from this case because of the significant local impact

17. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U. S. 276 (1961).

of the time-price differential paid by Pennsylvania residents and the relatively slight burden on interstate commerce from Pennsylvania's regulation of that differential.

We conclude then, that the district court properly granted the Attorney General's motion dismissing Aldens' complaint, because § 1103 conflicts with no provision of the federal constitution.

II. The Attorney General's Appeal.

The Attorney General was sued by Aldens because he had, by virtue of his official position, assumed the responsibility for the enforcement of the Goods and Services Installment Sales Act, and had threatened enforcement against Aldens. He filed a counterclaim seeking both a declaratory judgment that the Act was constitutional and an injunction ordering Aldens to comply. The district court granted Aldens' motion for judgment, holding (1) that the counterclaim was not one permitted by Rule 13, Fed. R. Civ. P., and (2) that even assuming the counterclaim was proper the application for declaratory relief, duplicating the relief requested in the complaint, was redundant or moot by virtue of the summary judgment on the complaint, and (3) that since the Attorney General could not obtain injunctive relief in the state court to enforce the Act he may not obtain such relief in the federal court. The Attorney General contends that in all three holdings the district court erred.

The district court's reasoning with respect to Rule 13 was that the Attorney General was not an "opposing party" within the meaning of the rule, although he was a proper defendant under *Ex parte Young*, 209 U. S. 123 (1908). The cause of action for a declaratory judgment or for enforcement relief, the theory goes, is that of the Commonwealth, not that of the Attorney General. The Attorney

General is being sued not in the capacity of owner of the cause of action, but in the private capacity of a potential constitutional tort feasor. It is true that the "private constitutional tort feasor" fiction of *Ex parte Young* and its progency overcame the holding in *Hans v. Louisiana*, 134 U. S. 1 (1890). But it does not necessarily follow that the same fiction must carry over into the interpretation of Rule 13.[18] In the fictional *Ex parte Young* cause of action though the individual defendant is deemed not to be the state for purposes of sovereign immunity, he is deemed to be be engaging in state action for purposes of the fourteenth amendment. The question is which fiction should prevail in interpreting the term "opposing party" in Rule 13. Oddly enough, we have been referred to no case squarely deciding the issue whether an *Ex parte Young*-type defendant is an "opposing party" for purposes of Rule 13.

The closest discussion is a dictum in *Dunham v. Crosby*, 435 F. 2d 1177 (1st Cir. 1970), *overruled on another ground, Roper v. Lucey*, 488 F. 2d 748, 751 n. 3 (1st Cir. 1973). In that case the plaintiff brought a § 1983 suit against school board members and the Superintendent as individuals for an allegedly wrongful dismissal. The defendants counterclaimed, pursuant to a Maine statute, for the return of salary paid to a teacher not holding a proper teaching certificate. The district court dismissed the § 1983 action as to the Superintendent for failure to exhaust administrative remedies, and the counterclaim as a matter of discretion under *United Mine Workers v.*

18. Nor do those cases dealing with counterclaims against fiduciaries present more than a remote analogy. They involve situations in which the defendant, having been sued by a plaintiff acting in a fiduciary capacity, asserts a counterclaim against the plaintiff in his individual capacity. *See, e.g.*, Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (9th Cir.), *cert. denied*, 346 U. S. 899 (1953).

Gibbs, 383 U. S. 715, 724-27 (1966). The First Circuit reversed the dismissal of the complaint against the Superintendent and remanded for reconsideration of the dismissal of the counterclaim. Its full discussion of the counterclaim is set forth in the margin.[19] The discussion contains no reference to Rule 13 but suggests that the school board members in their individual capacities may not counterclaim to recover a debt owed, if at all, to the school board as such.

There are both distinctions and similarities between *Dunham v. Crosby* and our case. A major distinction is that the counterclaim was for the recovery of money rather than for declaratory and injunctive relief. A major similarity is that Aldens could not have brought suit against the Commonwealth directly because of its sovereign immunity, and the plaintiff in *Dunham* could not assert a claim under § 1983 against the municipal entity as such. *Monroe v. Pape*, 365 U. S. 167, 187 (1961). Neither the similarities nor the dissimilarities seem to us controlling on the Rule 13 issue. That issue should be resolved consistently with the fundamental policy underlying Rule 13; that is, the expeditious resolution of all controversies growing out of the same transaction or occurrence or between the same parties in a single suit. This policy seems to us to point toward reliance on the fourteenth amendment fiction rather than the sovereign immunity fiction of *Ex parte Young*, and to the treatment of the Attorney General or other *Ex parte Young* defendant as an opposing party for purposes of the rule. This seems entirely appropriate when the counterclaim is for declaratory and injunctive relief.[20] Thus, we would not approve dismissal of the counterclaim on the first ground relied upon by the district court.

The second ground, that the prayer for declaratory relief is redundant and became moot upon the disposition of the complaint, has more to recommend it, where it is clear that there is a complete identity of factual and legal issues between the complaint and the counterclaim. See 6 C. Wright & A. Miller, Federal Practice & Procedure § 1406 (1971). Thus had the Attorney General sought only declaratory relief on the identical issue tendered by Aldens, we could justify dismissal of the complaint on this ground. But even a favorable ruling on the declaratory judgment could not render moot the request for injunctive relief. Thus we must move on to the court's final ground.

19. "Having reinstated appellant's complaint against the Superintendent, however the dismissal of the counterclaim must be viewed from slightly different perspective. Obviously the Superintendent alone cannot bring the counterclaim; if appellant is liable to anyone, it is to the school board, as a unit. Indeed, we have some doubt whether the counterclaim was proper in the first place since the members of the school board were sued as individuals, although in their representative capacities. On the other hand, we assume that the question to be resolved at trial on remand is closely related to the counterclaim. For example, if the court should find that appellant was improperly dismissed and that the Superintendent would have otherwise signed the crucial affidavit, that finding would probably determine the question whether appellant was teaching illegally. Thus, adjudicating these issues at one time would be consistent with the approach to judicial economy underlying the Federal Rules of Civil Procedure.

We, therefore, decline to reverse the district court's disposition of the counterclaim but remand the case for further consideration in light of our reinstatement of the complaint against the Superintendent. If the court so chooses, it may decide to permit the school board or the appropriate party to intervene and counterclaim under F. R. Civ. P. 24, or it may devise of other procedure designed to facilitate an efficient resolution of the disputes." 435 F. 2d at 1181 (footnote omitted).

20. Even when a counterclaim is for money, the practical difficulties mentioned by the First Circuit hardly seem insurmountable. For example, a judgment might provide that payment is required only when the missing entity tenders an apporpriate satisfaction.

While a counterclaim for declaratory relief with respect to the validity under the federal constitution of a state statute is a federal cause of action, a counterclaim for enforcement of the Pennsylvania statute is one arising under Pennsylvania law. Aldens urges that the enforcement mechanisms of the Pennsylvania Goods and Services Installment Sales Act provide adequate remedies at law, that the statute does not contemplate and the Pennsylvania courts would not grant injunctive relief, and that in any event the Attorney General would not be the proper plaintiff in an action for such relief. The Act provides for criminal penalties, 69 P. S. § 2201, for a private cause of action on the part of the buyer to recover any time-price differential or service charge when such violated the Act, 69 P. S. § 2202, and in some cases for treble damages 69 P. S. § 2204. Nothing in the Act precludes injunctive relief. However, the Statutory Construction Act of 1972, 1 P. S. § 1504 (1975 Supp.) states:

> "In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued . . . ."

Aldens contends that under the predecessor to § 1504 the Supreme Court of Pennsylvania concluded that the existence of specific statutory remedies precluded resort to injunctive relief. *West Homestead Borough School District v. Allegheny County Board of School Directors*, 440 Pa. 113, 269 A. 2d 904 (1970); *Commonwealth v. Glen Alden Corp.*, 418 Pa. 57, 210 A. 2d 256 (1965). Whether the Pennsylvania courts would apply the same rule with respect to the Goods and Services Installment Sales Act in view of the intended remedial purpose and the large number of potential small claimants is a question of no

little difficulty. If the Pennsylvania courts would grant injunctive relief, we do not believe the federal decision with respect to this permissive counterclaim should turn on the fact that in the state court the Attorney General would have commenced suit in the name of the Commonwealth. See the discussion respecting Rule 13 above. But a permissive counterclaim requires an independent basis of federal jurisdiction.[20] Unlike the counterclaim for declaratory relief, as to which there may be federal question jurisdiction, the counterclaim for enforcement of the Act arises under state law. A state is not a citizen for purposes of diversity jurisdiction.[21] While the complaint alleges, and the answer admits, complete diversity between Aldens and the Attorney General for purposes of Aldens' claim, we think it more proper to disregard the Attorney General's citizenship for diversity purposes when he seeks to enforce a state law claim on behalf of the state, even though he is an opposing party.

This leaves only pendent jurisdiction. Adjudication of a pendent state law claim is not a matter of right, but of discretion.[22] Considering the uncertainty under state law of the availability of injunctive relief for the enforcement of the Act the preferable course would have been to dismiss the complaint for injunctive relief without deciding it. That course would have left the Attorney General free to press a claim for injunctive relief in a state court free of the *res judicata* effect of a federal court decision on a state law issue.

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20. 6 C. Wright & A. Miller, Federal Practice & Procedure § 1422 (1971).

21. *See* State Highway Comm'n v. Utah Constr. Co., 278 U. S. 184 (1929); Fifty Associates v. Prudential Ins. Co. of America, 446 F. 2d 1187, 1191-92 (9th Cir. 1970) and cases cited therein; O'Neill v. Commonwealth, 459 F. 2d 12 (3d Cir. 1972).

22. UMW v. Gibbs, 383 U. S. 715, 724-27 (1966); Nolan v. Meyer, No. 75-7100 (2d Cir. , 1975).

We conclude, then, that the Attorney General's counterclaim for declaratory relief, presenting the identical issues posited by the complaint, was redundant and became moot when his motion for summary was granted, that his permissive counterclaim for injunctive relief did not became moot, but that the district court should have dismissed that request for relief without deciding the merits of the state law issues it presented.

III. Conclusion

The judgment in No. 74-1971 will be affirmed. The judgment in No. 74-1972 will be affirmed to the extent that it granted judgment on the pleadings dismissing the counterclaim for declaratory relief, but vacated and remanded to the district court for the entry of an order dismissing the counterclaim for injunctive relief without prejudice.

United States Court of Appeals
FOR THE THIRD CIRCUIT.

—

Nos. 74-1971 and 74-1972

—

ALDENS, INC.,
Appellant in No. 74-1971

v.

ISRAEL PACKEL, Attorney General for the Commonwealth of Pennsylvania, Individually and in his official capacity,
Appellant in No. 74-1972

—

(D. C. Civil Action No. 73-674)

—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge*, ALDISERT and GIBBONS, *Circuit Judges*.

—

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 2, 1974, be, and the same is hereby affirmed insofar as it granted the Attorney General's motion for summary judgment on Alden's Complaint, and the said judgment of the said District Court be, and the same is hereby affirmed insofar as it granted Alden's motion

for judgment on the pleadings dismissing the counterclaim of the Attorney General for declaratory relief, and the said judgment of the said District Court be, and the same is hereby vacated insofar as it denied the Attorney General's request for injunctive relief, and the cause is remanded to the said District Court for the entry of an order dismissing the counterclaim for injunctive relief without prejudice, all in accordance with the opinion of this Court. Costs taxed against appellants in case No. 74-1971.

ATTEST:

THOMAS F. QUINN,
Clerk.

August 27, 1975

United States Court of Appeals
FOR THE THIRD CIRCUIT.

—

Nos. 74-1971 and 74-1972

—

ALDENS, INC.,
Appellant in No. 74-1971

v.

ISRAEL PACKEL, Attorney General for the Commonwealth of Pennsylvania, Individually and in His Official Capacity,
Appellant in No. 74-1972

—

(D. C. Civil Action No. 73-674)

—

ORDER SUR PETITION FOR REHEARING.

—

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by ALDENS, INC. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of

the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Rosenn would grant rehearing.

By THE COURT,

JOHN J. GIBBONS,
Judge.

Dated: September 26, 1975

In the Supreme Court of the United States

October Term, 1975
No. 75-903

ALDENS, INC.,
Petitioner

v.

ROBERT P. KANE, Attorney General for the Commonwealth of Pennsylvania, Individually and in His Official Capacity,
Respondent

BRIEF IN OPPOSITION

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INDEX TO BRIEF

TABLE OF CITATIONS

CASES:

IN THE
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October Term, 1975
No. 75-903

ALDENS, INC.,

Petitioner

v.

ROBERT KANE, Attorney General for the Commonwealth of Pennsylvania, Individually and in his Official Capacity,

Respondent

BRIEF IN OPPOSITION

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States and at the request of this Court,[1] Respondent Robert Kane submits this brief in opposition to Aldens' Petition for a Writ of Certiorari.

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[1] By letter dated January 10, 1976, pursuant to Rule 24(3) of the Rules of this Court, Respondent Packel expressly waived his right to file a Brief in Opposition. However, by letter dated January 29, 1976, the Office of the Clerk of this Court, under direction from this Court, requested that a response be filed. At Respondent's request, an extension of time until March 25, 1976, in which to file such a response was granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 524 F.2d 38 (3d Cir. 1975); the opinion of the United States District Court for the Middle District of Pennsylvania is reported at 379 F. Supp. 521 (1974).[2]

[2] References herein to the opinions of the lower courts will be cited to the official reporters and the appendix to Aldens' Petition at pages 1b-48b.

QUESTIONS PRESENTED

1. Does the Due Process Clause bar a state from regulating transactions in which it has a substantial protective interest where the regulation involved affects only those transactions having a substantial local impact on residents of the regulating state?

2. Does the Commerce Clause protect a foreign seller from state regulation which imposes only that reasonable burden necessary to protect the substantial state interest in protecting its citizens from overreaching and deception in consumer credit transactions?

STATEMENT OF THE CASE

Aldens is an Illinois corporation operating a mail order business. By catalogs and flyers mailed from Chicago, it solicits orders in fifty states, including Pennsylvania.

Aldens' annual mail order sales to Pennsylvania customers amount to approximately $14,900,000. Twenty-seven percent (27%) of this amount is derived from cash sales; seventy-three percent (73%) from credit sales. Approximately 90,000 Pennsylvania residents annually buy merchandise from Aldens on credit. Each year Aldens floods the state with advertising material. To its 149,000 regular Pennsylvania customers, Aldens mails catalogs 4 times per year, with supplemental advertising "flyers" mailed 6 to 8 times per year. Additional advertising material is sent with every monthly bill. Beyond these, Aldens mails catalogs and flyers to 2,100,000 Pennsylvania residents whose names are supplied by mailing list brokers.

Application forms for credit accounts with Aldens and credit agreement forms are also mailed regularly to Pennsylvania residents. Twenty-three percent (23%) of the credit application forms are checked for credit-worthiness on behalf of Aldens by an Illinois credit reporting agency which telephones Pennsylvania credit bureaus for in-file record checks on Pennsylvania resident applicants.

Pennsylvania customers delinquent in payment of accounts are dunned by Aldens from Chicago by mail and by telephone.

Aldens conducts its mail order business with residents of all fifty (50) states.

Aldens discloses its interest rates in conformity with the Federal truth-in-lending law, but its annual percentage rate of twenty-one percent (21%) exceeds the fifteen percent (15%) rate permitted by Section 904 of the Pennsylvania Goods and Services Installment Sales Act, 69 P.S. §1904. This additional six percent (6%) interest results in finance and service charge revenues from Aldens' Pennsylvania customers of $750,000 per year.

In this case, Aldens sought a declaratory judgment that the application of the Pennsylvania Goods and Services Installment Sales Act, 69 P.S. §1101 *et seq.*, to Aldens' transactions with Pennsylvania residents would be in violation of the Due Process and Commerce Clauses of the Constitution of the United States.

The trial court, the United States District Court for the Middle District of Pennsylvania considered but rejected, Aldens' argument that the Commerce Clause bars any state regulation of purely interstate commerce. Rather, that court found that in light of Aldens' substantial "exploitation of the Pennsylvania market", and the substantial state interest in that activity, the application of the challenged Act to Aldens' activities did not constitute an undue burden on interstate commerce. The district court also found that exploitation of the local market to be sufficient minimum contact for due process purposes.

The Court of Appeals affirmed rejecting Aldens' due process challenge on the grounds that the Act was a proper exercise of the state's sovereign protective interest in the regulated transactions. Considering Aldens' Commerce Clause arguments, the Court of Appeals applied a balancing test, in which it weighed the "national interest in the free movement of money, credit, goods and services" against "the valid local interest in restricting maximum

rates on consumer 'loans' and setting uniform contract terms for such transactions." 524 F.2d at 47-48 (41b). Noting that Congress had expressly refused to act in the area, and finding that the burden imposed by the application of the Act was slight when compared to the significant local impact of that commerce, the Court affirmed the trial court's holding that the application of the Act to Aldens' activities did not impose an undue burden on interstate commerce.

ARGUMENT

I. The Court of Appeals Properly Held the Due Process Clause Does Not Bar Pennsylvania From Regulating the Interest Rates Charged Its Residents in Mail Order Installment Sales

In evaluating Aldens' due process challenge to Section 1103, the Court of Appeals correctly noted that the most recent due process holdings of this Court have involved attempts at extraterritorial service of process in relation to which this Court:

> "made an interest analysis which focused upon the interest of the state which would or would not suffice to justify *any* exercise of its sovereignty in connection with the transactions in dispute." 524 F.2d at 42 (27b).

The Court of Appeals went on to note that those holdings establish:

> "that the due process clause defines a rather low threshold of state interest sufficient to justify exercise of the state's sovereign decisional authority with respect to a given transaction." *Id.* at 43 (27b).

Applying that interest analysis to the facts of this case, the Court found that:

> "Pennsylvania's interest in the rates which its residents pay for the use of money for the purchase of goods delivered into Pennsylvania is substantial

enough to satisfy any due process objection to its attempt at regulating the subject matter." *Id.* at 43 (27b).

Aldens' primary contention is that the application of this "low-threshold" "interest analysis" to the instant case is inconsistent with the cases in which this Court has considered extraterritorial regulation or taxation of non-resident corporations by the states. In support of its contention, Aldens relies heavily on *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), a case in which this Court held that an Illinois statute imposing a duty on an out-of-state mail order seller to collect Illinois use taxes was unconstitutional. Aldens also cites several other cases, *Hartford Accident and Indemnity Co. v. Delta and Pine Land Co.*, 292 U.S. 143 (1934); *New York Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), in which this Court "invalidated on due process grounds, the extraterritorial application of forum law to contracts made elsewhere" on the basis of an analysis of physical presence in the regulating state and a finding that none existed.

As the court below correctly recognized, the older due process cases relied on by Aldens have little or no vitality. The "presence concept" of doing business on which they are based has clearly been displaced by the more realistic interest analysis which has been applied by this Court in more recent cases such as *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) and *Hoopeston Co. v. Culler*, 318 U.S. 313 (1943). 524 F.2d at 43 (28b). While Aldens would distinguish most of those cases as being limited to the

field of jurisdiction for the purpose of extraterritorial service of process, courts have not felt so constrained. Indeed, this Court too has "rejected the contention . . . that a state's *power to regulate* must be determined by a 'conceptualistic discussion of theories of place of contracting or of performance' " and has instead "accorded 'great weight' to the 'consequences' of the contractual obligations" in the regulating state and the " 'degree of interest' that state had in seeing that those obligations were faithfully carried out". *Travelers Health Ass'n v. Virginia*, supra at 648 (emphasis added), quoting *Hoopeston Co. v. Cullen*, supra, at 316. Although, as Aldens notes, *Travelers* was concerned primarily with extraterritorial service of process, other courts have applied this same analysis in determining the constitutionality of state regulations.

For example, in *Minister's Life and Casualty v. Haase*, 30 Wisc. 2d 339, 141 N.W. 2d 287, *appeal dismissed* 385 U.S. 205 (1966), a Minnesota insurance corporation attacked a comprehensive regulating and taxing statute of Wisconsin on the ground, *inter alia*, that it was violative of due process. As in the instant case, the foreign corporation had no office, officer, bank or real estate in the regulating state and solicited business through published advertisement and by direct mail. In the case of individual policies, all transactions were conducted by mail, while in the case of group insurance policies there was a non-agent Wisconsin group leader who negotiated with the insurer, received the literature and forms, enrolled members, received the master policy and premium notices for the group and remitted the premiums to the insurer. The Wisconsin Supreme Court had little trouble rejecting the insurer's due process contentions as it found that by

its systematic and continuous solicitation of business in Wisconsin, the insurer had " 'realistically entered the state looking for and obtaining business' " and that because that activity was a matter of great public concern and was directly related to the challenged regulation the standards of due process were satisfied. 141 N.W. 2d at 295. Ministers' appeal to this Court was dismissed for lack of a substantial federal question. 385 U.S. 205 (1966).

In a later case, even more closely on point, the Supreme Court of California upheld a California licensing and regulating statute against a challenge by an out-of-state insurer conducting its business *entirely* by mail. *People v. United National Life Insurance Co.*, 58 Cal. Rptr. 599, 427 P.2d 199, *appeal dismissed* 389 U.S. 330 (1967). "Applying due process criteria which give recognition to the substantial interest of the regulating state in the . . . transactions involved", and noting that the insureds were residents of California and that "realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here [in California] as manifestly as if it were to carry on such solicitation through representatives physically present within this state", the California court concluded that the California regulation could constitutionally be applied to the mail order transactions. 427 P.2d at 209-10. The appeal to this Court in that case was also dismissed for want of a substantial federal question.

What emerges from an examination of these and other relevant cases is not the simple presence-oriented analysis asserted by Aldens, but rather a multi-faceted analysis which focuses not merely on the volume, location and type of activity which the state has sought to "regulate" or even the state's abstract interest in that activity,

but also on the manner in which the state has attempted to assert it sovereignty over that activity and the relationship of that attempted "regulation" to the state's interest in the activity.

Contrary to Aldens' contention, this analysis in no way conflicts with that applied in *National Bellas Hess*. Indeed, the tax cases perhaps best illustrate the application of this analysis. While the state interest in its fisc is high on its scale of values, as the lower court recognized, "no extraterritorial manifestation of sovereignty, except possibly arrest, is quite so offensive to common notions of its territorial limitations". 524 F.2d at 43. Thus, the state may assert its sovereignty to protect its interest in its fisc only as to activities directly related to that interest, i.e. those activities directly benefitting or drawing from the public fisc. Under this analysis, it was not the location of activity in *National Bellas Hess* which was crucial, but rather the relationship of that activity to state interest asserted in support of the challenged "regulation".

In the instant case, Pennsylvania, in the exercise of its police powers, has a clear interest in protecting its citizens from abuse by sellers in installment transactions, the manner of regulation, an interest rate ceiling, is clearly related to that interest and it is only activities which directly affect that interest which are regulated. Under these circumstances, especially in light of the multi-million dollar volume of business conducted by Aldens with Pennsylvanians, the decision of the Court of Appeals was both proper and consistent with the prior holdings of this Court and, therefore, need not be reviewed by this Court.

II. The Pennsylvania Goods and Services Act Does Not Impose an Undue Burden on Interstate Commerce and, Therefore, Is a Proper Exercise of the State's Police Power

This Court has repeatedly stated that, even though the Commerce Clause has conferred upon Congress the power to regulate commerce, it has not withdrawn from the states the power to regulate or control matters of local concern so long as Congress has not acted in the area, and the regulation is not discriminatory[3] and does not impose an undue burden on interstate commerce. *Robertson v. California*, 328 U.S. 440 (1945) (hereinafter *"Robertson"*); *California v. Thompson*, 313 U.S. 190 (1940). See *Head v. New Mexico Board*, 374 U.S. 424 (1962). Thus, the Court has allowed the states great leeway in regulating in areas affecting the health, safety and welfare of their citizens. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1938).

Recognizing this, the Court of Appeals described this Court's Commerce Clause adjudications as allowing state regulation of any transaction which is "within the broad ambit of congressional power to regulate interstate commerce, and,

(1) is one in which Congress has made its own choice of law, or

(2) is one in which Congress had made no specific choice of law, but,

[3] Defendants herein do not allege before this Court that the Act discriminates against interstate commerce. Nor do they contend that Congress has acted in the area.

(a) despite this inaction the nature of the subject matter requires a uniform national rule, or

(b) the choice of law made by the state discriminates against persons engaged in interstate commerce in favor of local interests, or

(c) a non-discriminatory state choice of law . . . imposes a burden on interstate commerce in excess of any value attaching to the state's interest in imposing its regulation." 524 F.2d at 45-46 (32b-34b) (footnotes omitted).

Eliminating categories (1) and 2(a)[4] immediately, the lower court also rejected as "fanciful" Aldens' argument that the Pennsylvania Act discriminates and went on to apply the balancing test required by category 2(c).

[4] The Court of Appeals relied on Section 1610(b) of The Federal Truth in Lending Act, 15 U.S.C. §1610(b), as evidence that Congress had not made its own choice of law and that the subject matter of consumer credit interest rates does not require a uniform national rule. The court also distinguished this Court's holding in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), on the basis that no such statute existed in that case. Aldens challenges this basis of distinction on the grounds that Section 1610(b) did not expand preexisting state power and, therefore, is irrelevant to determining Commerce Clause limitations on that power. As is discussed at length below, the Court of Appeals also distinguished *Allenberg* on the entirely separate grounds that the commerce in the instant case has a more significant local impact than that in *Allenberg* and that a lesser burden has been imposed on that commerce. Because, as is also discussed at length below, this reasoning is independently sufficient to distinguish *Allenberg* and support the holding of the lower court, the significance of the Section 1610(b) need not be considered by this Court except insofar as it demonstrates a conscious lack of action in the area by Congress and a lack of need for national uniformity.

It is the very application of such a test which Aldens attacks as it asserts that *any regulation* of "purely interstate commerce", i.e. apparently that involving no physical presence of activity in the forum state, is absolutely barred by the Constitution. Of course, the logical extension of this position is that the states are helpless to regulate any activity conducted entirely by mail, however harmful its effect on their citizens. Both the position and its corollary are without merit. Rather, the Commerce Clause has never been a "guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community". *Robertson,* supra, at 458. To the contrary, as was noted by the court below:

> "The burden on interstate commerce does not depend upon the happenstance of the respective locations of buyer and seller." 524 F.2d at 47 (37b).

In so holding, the Third Circuit found no difference, for Commerce Clause purposes, between a mail order house with no physical presence in Pennsylvania and one located in Philadelphia, but dealing in interstate commerce in other aspects of its business. The court went on to recognize that:

> "Pennsylvania's regulation of the time price differential in mail order sales by the Philadelphia mail order house, therefore, imposes on interstate commerce the same burden as in the case of Aldens. The decisive issue . . . is not whether §1103 is valid as applied to Aldens, but rather whether Pennsylvania can regulate the time-price differential on any consumer credit transaction in the stream of interstate commerce." 564 F.2d at 47 (37b).

Thus, the fundamental issue is not Aldens' physical location but rather "whether the national interest in the free movement of money, credit, goods and services outweights the valid local interest in restricting maximum interest rates on consumer 'loans' and setting uniform contract terms for such transactions." 524 F.2d at 47-48 (37b).

That this balancing test is proper even as to commerce conducted solely by mail is clear from an analysis of other relevant cases. In determining what constitutes an undue burden on commerce such as is barred by the Commerce Clause, this Court has not limited itself to an examination of the nature of the commerce affected, but rather has also considered the nature of the regulation and the interest which it is intended to protect. *Robertson,* supra at 458. Thus, the state interest in protecting its citizens has been found to be so strong in some cases that states have even been permitted to prohibit entirely the entry of certain dangerous products. *Robertson,* supra at 358-59; *Rasmussen v. Idaho,* 181 U.S. 198 (1901); *Missouri v. K. & T.R. Co. v. Haber,* 169 U.S. 613 (1898). Obviously, in these cases there could be no physical presence or activity whatsoever.

Nonetheless, it must be admitted that there appear to be certain state regulations of interestate commerce which have never been permitted absent extensive physical contact. In this regard, the types of state "regulation" most frowned upon by the Court have been those conditioning the right to enforce contracts for interstate commerce, *Allenberg Cotton Co. v. Pittman,* 419 U.S. 20 (1974), and those imposing a tax or tax collection duty on interstate commerce, *National Bellas Hess v. Dept. of Revenue,* 386

U.S. 753 (1967). See also *Freeman v. Hewit*, 329 U.S. 249 (1946). These types of state regulation have traditionally been held to be so burdensome as to be almost unjustifiable absent substantial physical contact, regardless of the alleged state interest protected. *International Text-Book Co. v. Pigg*, 217 U.S. 19 (1910) (regulation also held discriminatory). Yet, even in these cases, there appears to be a balancing test applied wherein the state interest, if any, is compared to the nature and importance of the commerce affected and the nature of the burden imposed on that commerce. For example, much of the analysis in *Allenberg* is directed at establishing the importance of the market involved therein. *Allenberg Cotton v. Pittman*, supra, at 26-30.

Even Justice Douglas, one of this Court's strictest interpreters of the Commerce Clause in relation to state action, recognized the necessity of such a test. See *Eli-Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276, 292 (1961) (Douglas J. dissenting).[5] Thus, the express limitation of the Court's holding in *Allenberg* to the unconstitutionality of "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce", *Allenberg Cotton Co. v. Pittman*, supra, at 34, is significant.[6] Nor is that case inconsistent with the Court's statement in *Robert-*

[5] Dissenting from an opinion allowing a state to bar an unlicensed foreign corporation from its courts, Justice Douglas weighed but rejected the state interest as insufficient to justify the heavy burden he found the licensing requirement to impose on interstate commerce. *Id.*

[6] Also significant is the failure of the Court to refer to *Robertson*, especially in light of the heavy reliance on that case in lower court cases brought before the Court as late as 1970. See cases cited p. 21, infra.

son that "it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative." *Robertson*, supra, at 458. Rather, as was noted above, it can only be assumed that the public interest alleged to be served by a state's refusal to honor contracts entered into in interstate commerce is insufficient to justify the burden imposed by that particular prohibition when applied to the flow of commerce in an important national market.

In *National Bellas Hess*, this Court relied almost entirely on tax cases and then expressly recognized that the same principles established in those cases:

> "have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales." 386 U.S. at 756.

That different principles apply in determining the validity of police regulations was made clear in *Freeman v. Hewit*, supra, a case which was quoted and relied on in *National Bellas Hess*. *Id.*

In *Freeman*, while holding a state taxing statute unconstitutional under the Commerce Clause, this Court clearly distinguished the state's exercise of its police power where Congress had not acted:

> "[i]n the necessary accomodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital

local interests. At least until Congress chooses to enact a nationwide rule, the power will not be denied to the State [citations omitted]. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys . . . . Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, *attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce.*" 329 U.S. at 253 (Emphasis added.)

National Bellas Hess, like *Allenberg,* is clearly a case in which the particular burden imposed was found to be in excess of the value attaching to the asserted state interest. It, thus, fits neatly into the lower court's category 2(c) and is, in no way, inconsistent with the holding in this case.

That the states are free to regulate even "purely interstate commerce" is clear from this Court's holding in *Robertson v. California,* supra, which upheld the constitutionality of California insurance regulations notwithstanding the fact that they applied to foreign corporations with no physical presence in California and could, in fact, have the effect of barring such corporations from doing any business in that state. *Robertson,* supra, at 460.

In its brief to the lower court of appeal, Aldens described *Robertson* as a case involving only regulation of local insurance agents and the power of the state to prosecute such agents for selling insurance without a license.

While this was indeed the factual situation, because the statutory scheme involved had the effect, in some cases, of entirely prohibiting interstate commerce from entering the state, the Court found it necessary to consider fully the extent of the state's power to regulate purely interstate commerce.

In *Roberston,* the appellant was convicted of two violations of statute, one of which made it a misdemeanor to sell insurance for a non-admitted insurer unless the seller was licensed as a "surplus line broker". Appellant contended that because California's statutory scheme when viewed in its entirety had the effect of absolutely prohibiting the writing of or aiding in procuring of any insurance issued by the foreign insurance company for which he had acted, it had the effect of prohibiting that company from doing any business in California and, therefore, violated the Commerce Clause. Finding that "the Society is excluded from transacting insurance business [in California] by the admission requirements and its failure to comply with them . . . [and] also that appellant would be forbidden to place insurance with it . . .", the Court went to consider fully appellant's "crucial" contention "that the state cannot exclude foreign companies, . . . or their agents, from carrying on their business in California for failure to meet her reserve requirements." 328 U.S. at 455, 457. The contention was rejected as the Court clearly resorted to a balancing test similar to that applied in *Aldens:*

> "Here *California's reserve requirements* for securing authority to do business *cannot be held,* either on the face of the statute or by any showing that has been made, *to be excessive for the protection of the local interest affected;* or designed or effective either to discriminate against foreign or interstate insurers

or to forbid or exclude their activities, by all who are able and willing to maintain reasonable minimum reserve standards for the protection of policyholders. Exclusion there is, but it is exclusion of what the state has the power to keep out, until Congress speaks otherwise. Every consideration which supports the licensing of agents and brokers, and the authorities we have cited giving effect to those considerations [footnote omitted], sustain the state's requirements in this respect, as do also the decisions which have sustained various measures of exclusion in protection of the public health, safety and security not only from physical harm but from various forms of fraud and imposition [footnote omitted].

"It is quite obvious, to repeat only one of those considerations, that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the South-Eastern decision dictates such a result." 328 U.S. at 459-60. (Emphasis added.)

Thus, in upholding appellant's criminal conviction, the Court necessarily dealt with and upheld the constitutionality of California's regulation and licensing of interstate commerce even though it had the effect, in some cases, of entirely prohibiting such commerce from entering the state in any manner.

Clear evidence that the holding and reasoning of *Robertson* is still vital can be found in this Court's dismissal of the appeals in two relatively recent cases dealing with regulation of an activity entirely unrelated to insurance—small loan businesses. *Oxford Consumer Discount Co. v. Stefanelli*, 246 A.2d 460 (Superior Ct. N.J. 1968), *appeal dismissed* 400 U.S. 308, *rehearing denied* 400 U.S. 923 (1970); *People v. Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812, *appeal dismissed* 382 U.S. 1 (1965). Both cases involved regulation of foreign corporations which conducted their business in the forum state *entirely* by mail. See also *Miller v. California*, 413 U.S. 15 (1973), in which this Court held that state regulation of "mailing" obscene materials was not in violation of the Commerce Clause. *Id.* at 17-18, No. 13.

In short, the Court of Appeals's application of a balancing test in this case is in no way inconsistent with the prior holdings of this Court and, therefore, need not be reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, its Petition should be denied.

Respectfully submitted,

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